

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

INDUSTRIA DE ALIMENTOS ZENU	.	
S.A.S.,	.	
	.	
Plaintiff,	.	Case No. 16-cv-06576
	.	
vs.	.	Newark, New Jersey
	.	October 25, 2019
LATINFOOD U.S. CORP., et al.,	.	
	.	
Defendants.	.	

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE MICHAEL A. HAMMER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	PETER D. RAYMOND, ESQ. Reed Smith LLP 599 Lexington Avenue New York, NY 10022 (212) 549-0364 Praymond@reedsmith.com
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1 (APPEARANCES continued)

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1 (Commencement of proceedings at 10:08 A.M.)

2

3 THE COURT: All right. We are on the record in  
4 Industria de Alimentos versus Latinfood U.S., Civil  
5 No. 16-6576, for a hearing and conference on a number of  
6 discovery disputes that the parties have presented to the  
7 Court by way of their July 26th joint letter, Docket  
8 Entry 157.

9 So can I have appearances, please, beginning with  
10 plaintiff's counsel.

11 MR. KADOSH: Your Honor, Sam Kadosh and Peter  
12 Raymond from Reed Smith for plaintiff Industria.

13 THE COURT: All right. And for the defendants.

14 MR. INGBER: Your Honor, Mark Ingber and my  
15 paralegal Barry Chen for the defendants.

16 THE COURT: All right. Good morning, Counsel.

17 We have a lot to cover, so let's just dive right  
18 in.

19 The first issue is the plaintiff essentially wants  
20 to depose Wilson -- and if I mispronounce this, please let me  
21 know -- Zuluaga. I don't get a sense that there's a dispute  
22 about Zuluaga as a Rule 30(b)(1) fact witness, but the  
23 concern that the defendant has raised is that whether  
24 Mr. Zuluaga can be redeposed by the plaintiff regarding the  
25 spoliation issue. The defendant argues that Mr. Zuluaga has

1 already been deposed on the spoliation issue and that, in  
2 fact, the plaintiff was allowed a full day of deposition on  
3 the spoliation issue. And so, essentially, why are we  
4 covering old ground?

5 The plaintiff argues that there are certain issues  
6 that the -- that were not previously covered.

7 So I guess what I'm really doing is addressing both  
8 discovery disputes 1 and 2. Let me see if we can nail this  
9 down.

10 Is the defendant arguing that plaintiff -- putting  
11 aside the spoliation issue, the defendant shouldn't be  
12 allowed -- I'm sorry -- the plaintiff shouldn't be allowed to  
13 depose Mr. Zuluaga at all?

14 MR. INGBER: No. No, Your Honor. We're just --  
15 this is Mark Ingber.

16 We're just trying to -- a couple of issues. We're  
17 trying to -- we're trying to avoid having him being deposed  
18 on the spoliation issue.

19 THE COURT: Right.

20 MR. INGBER: And they're -- and the plaintiff's  
21 deposition topics, on the deposition topics, they repeat the  
22 same issues about covering spoliation.

23 THE COURT: All right. So your issue is about the  
24 spoliation and not the fact --

25 MR. INGBER: That's --

1           THE COURT: -- of taking a Rule 30(b)(1) deposition  
2 of him.

3           MR. INGBER: Secondly, Your Honor, they -- they --  
4 my client is a -- is a named defendant individually. And the  
5 defendant -- the plaintiff's counsel seems to be trying to,  
6 you know, do an end-around and try to depose him multiple  
7 times based on his 30(b)(6) capacity and in -- as an  
8 individual defendant so that they could ask whatever they  
9 want. It's -- we've --

10          THE COURT: Well, they can ask whatever they want,  
11 as long as it's relevant. Again, putting aside the  
12 spoliation issue -- and I'm going to -- we're going to  
13 address that separately -- it's not uncommon, particularly in  
14 a smaller business, which you've asserted Latinfood is -- for  
15 a 30(b)(1) witness to also be a 30(b)(6) witness.

16          MR. INGBER: Right, but they want to have -- we  
17 want that deposition to be deposed simultaneously,  
18 Your Honor.

19          We agree that our witness Mr. Zuluaga, when he's  
20 testifying, would be testifying both in his corporate and  
21 individual policy. And the defendant -- the plaintiff's  
22 counsel cited a case that's saying is -- versus Electronic  
23 Data, which we -- allowing a witness to be deposed  
24 simultaneously, and we agree with that. But, again, it just  
25 seems plaintiff has left the door open by saying that, oh,

1 they could depose him separately and call him again.

2 MR. KADOSH: No, that is incorrect. Your Honor.  
3 We're not --

4 THE COURT: Well, number one, don't ever interrupt  
5 counsel.

6 MR. KADOSH: I'm sorry.

7 THE COURT: I just want to make that clear at the  
8 outset, because I know this case has been plagued by fights  
9 between the counsel -- believe me, I read the deposition  
10 expert [sic] -- excerpts from the -- that counsel gave me,  
11 and, frankly, I was little disturbed to see the level of --  
12 or the interaction. I want to make clear, because we have a  
13 number of issues to cover, each side will certainly get a  
14 full and fair opportunity to be heard. But please do not  
15 interrupt each other.

16 Mr. Ingber, what were you saying?

17 MR. INGBER: Your Honor, I was saying, again, that  
18 all witnesses, Mr. Zuluaga, once we confirm that he's not  
19 going to be redeposed hopefully on the spoliation issues,  
20 when he's testifying, he's going to be testifying one time in  
21 his individual and corporate capacity. And his responses be  
22 bind the defendants in all situations. And we cite, again,  
23 to the very case cited by the plaintiff on page 1 of the  
24 July 26th letter, the Zang v. Electronic Data Systems Corp.  
25 case [phonetic]. If you want, I could give you the cite.

1 THE COURT: No. I have it right here. And I  
2 understand that.

3 All -- all Zang basically said was you could be  
4 deposed as both a 30(b)(1) and a 30(b)(6). I have a hard  
5 time believing that the Court essentially micromanaged the  
6 order of questioning.

7 Is that what the parties are asking me to do?

8 MR. INGBER: Well, Your Honor, if you don't think  
9 that that case is sufficient, then we refer to the -- the  
10 State Farm Mutuals Funds case cited on page 4, which says  
11 that the district court rejected the defendant's attempt to  
12 depose a witness in his individual capacity after that  
13 witness has already been deposed as his organization's  
14 Rule 30(b)(6) designee.

15 THE COURT: No. I'm familiar, and I read that  
16 case.

17 Upon finding, essentially, that the questioning as  
18 to one provided all of the relevant discovery that counsel  
19 could reasonably expect to get as to the second category.

20 Look, if -- if what -- if the issue is do the  
21 defendants -- or plaintiffs, rather, get to question  
22 Mr. Zuluaga as both a 30(b)(1) witness and a 30(b)(6), the  
23 answer to that is plainly yes. In terms of the ordering of  
24 the questions, I'm not sure -- and there may be areas --  
25 because I don't know the full scope of Mr. Zuluaga's

1 anticipated testimony. There may be areas where his 30(b)(6)  
2 testimony overlaps with the 30(b)(1) testimony. Right?

3 MR. INGBER: Correct.

4 THE COURT: Which would largely render a lot of  
5 this moot. It would have the effect of him testifying  
6 simultaneously. But it would render a lot of this moot.

7 So let's deal with the larger issue first of -- so  
8 there's no objection to -- if I understand correctly, there's  
9 no objection to -- and I'm not sure there's even a dispute  
10 between the parties, then, as to plaintiff deposing  
11 Mr. Zuluaga both under Rule 30(b)(1) and Rule 30(b)(6).  
12 Right?

13 MR. INGBER: Correct, Your Honor.

14 THE COURT: Okay. And I assume that's what the  
15 plaintiffs are looking to do?

16 MR. KADOSH: That's right, Your Honor. On the same  
17 date. We noticed the depositions for the very same date.  
18 We're not looking to take two separate depositions of him.  
19 But it's just there are certain restrictions on 30(b)(6)  
20 depositions that you have to notice the topics in advance --

21 THE COURT: There are certain topics. Right.

22 MR. KADOSH: Right. So we just want, you know, a  
23 date with him where he'll both be there as a 30(b)(6) and a  
24 30(b)(1). So I don't -- I don't think there's a --

25 THE COURT: I'm still not sure I see the dispute.



1                   So here -- but here's how we'll handle it.

2                   MR. KADOSH: I don't think there is a dispute. I  
3 think -- you know, I think maybe perhaps Mr. Ingber is  
4 misunderstanding that we want to take him on two separate  
5 days in his 30(b)(6) and 30(b)(1) capacity, which is the  
6 situation that the State Farm case envisioned --

7                   THE COURT: Right.

8                   MR. KADOSH: -- but we're not.

9                   THE COURT: Right.

10                  MR. KADOSH: We noticed them for the same date.  
11 And, you know, we want him for one day both as a 30(b)(6) and  
12 as a 30(b)(1). That's all. I don't think there's a dispute  
13 here, Your Honor.

14                  THE COURT: So to move this along, I'm going to  
15 allow the plaintiff to depose -- by the way, at the outset, I  
16 should say, I'm entrusting counsel to take good notes on  
17 this, because you folks are going to jointly prepare and  
18 submit the form of order embodying the Court's rulings at the  
19 conclusion of today's hearing. Okay?

20                  I'm going to allow the plaintiff to depose  
21 Mr. Zuluaga, both as a fact witness under Rule 30(b)(1) and  
22 Rule 30(b)(6). I am not -- for one day, I am not going to  
23 micromanage the order of questions. I think that would be,  
24 frankly, an exercise in futility. But if in the course of  
25 the deposition, Mr. Ingber believes that the questioning has

1 somehow become redundant or repetitive, not merely in and of  
2 itself, because that's a basis for an objection, but not to  
3 terminate or limit a deposition, but to the point where it  
4 borders on harassment or there's some issue that arises, the  
5 parties will be able to call me to adjudicate the dispute.  
6 Same as any other deposition.

7 MR. INGBER: Thank you, Your Honor.

8 THE COURT: All right. So we've resolved that.

9 Let's turn to the issue of the spoliation question.  
10 Now, I'm going to direct my first questions to plaintiff's  
11 counsel.

12 I have to say, frankly, from what I see in the  
13 joint letter, the explanation about this uncovered evidence  
14 from third parties is so vague that I am not sure that I  
15 understand what that is, much less how that warrants a new  
16 opportunity to question about spoliation. And I -- perhaps,  
17 actually, before we even get to that. If the plaintiff did  
18 get this third-party discovery, did plaintiff produce it to  
19 the defense under Rule 5(a)(1)(C)?

20 MR. KADOSH: Yes, Your Honor, we've produced  
21 everything.

22 THE COURT: Okay. Second question, I saw --  
23 because occasionally magistrate judges do peek behind the  
24 curtain -- I saw the exchange between the parties --  
25 actually, I think it was also brought up in the joint

1 letter -- and I understand it was probably the result of a  
2 lot of communications between the parties.

3 But why is it that when defense counsel asks you  
4 for more information as to the additional spoliation  
5 questioning, plaintiff didn't -- you didn't provide it.  
6 Instead you basically said, we're not going to provide you  
7 with an outline of our deposition of Mr. Zuluaga, so we  
8 decline your request that we provide you with the additional  
9 facts necessitating additional questions on the spoliation  
10 topics.

11 I've got to tell you, I didn't read anything in  
12 asking for additional facts as asking for an outline of your  
13 deposition questions. And I have some real concerns as to  
14 whether the parties really met and conferred under Rule 37 in  
15 that issue.

16 MR. KADOSH: Your Honor, my view was that we had  
17 provided all of the new discovery material to Mr. Ingber.  
18 Right? So he received the production from Network Solutions.  
19 He received the production from Jamal Meeks [phonetic]. And  
20 I don't want to necessarily give him my game plan for the  
21 questions that I'm going to ask. He knows what -- what new  
22 material is out there. I don't want to give him my game plan  
23 to prepare his witness, you know, to know exactly what  
24 questions we're going to ask.

25 THE COURT: Well, if he has the documents and if

1 you're going to be asking him about the documents, how much  
2 of a game plan are you really giving up? Maybe it's easy for  
3 me to ask that because I haven't seen the documents. But --  
4 so let's do this. Let's fast-forward.

5 What are these documents that we're talking about?  
6 How did they give rise to these new revelations?

7 MR. KADOSH: After the February 2018 deposition, we  
8 learned that Mr. Ingber [sic] had a different email account  
9 that we used for business -- used for business  
10 communications. We learned this from productions from a  
11 third party. Right? That's something that is obviously --  
12 that was -- that was -- at his deposition, he said he didn't  
13 have any other business email addresses.

14 THE COURT: Wait, wait, wait, wait. I'm sorry.  
15 Because you started out by saying "Mr. Ingber" had a  
16 different email account?

17 MR. KADOSH: I'm sorry. I'm sorry.  
18 Mr. Zuluaga.

19 THE COURT: Okay. So --

20 MR. KADOSH: I apologize.

21 THE COURT: -- so -- that's all right. So  
22 Mr. Zuluaga has a different email -- a different email  
23 account.

24 Okay. Go ahead. I'm sorry.

25 MR. KADOSH: And it was asked about at this

1 | spoliation deposition, and he identified only one email  
2 | account. He didn't identify this other email account that we  
3 | learned about afterwards. And that's his Gmail account.

4 |           The second issue --

5 |           THE COURT: Well, wait -- I'm sorry. I'm just -- I  
6 | want to hear what you have to say. I'm just trying to keep  
7 | up.

8 |           Which one was the Gmail? Was the one he disclosed  
9 | at the deposition or the one you subsequently found?

10 |           MR. KADOSH: That's the one that we subsequently  
11 | found.

12 |           THE COURT: Okay.

13 |           MR. KADOSH: That he used for business purposes.

14 |           THE COURT: Right.

15 |           MR. KADOSH: He identified it at his deposition, at  
16 | the spoliation deposition, but he did not identify it as one  
17 | that was being used for business purposes.

18 |           THE COURT: I follow. Okay.

19 |           MR. KADOSH: The second issue, Your Honor, is we  
20 | received metadata from Network Solutions.

21 |           THE COURT: Wait, before we get to the second  
22 | issue. So -- how do we know -- I think I know -- I think I  
23 | know what you're going to tell me. But how do we know that  
24 | this other Gmail account that he disclosed at the deposition  
25 | but did not disclose as being used that he used it for

1 business purposes, how do you know he used it for business  
2 purposes? Have you got emails from third parties for --

3 MR. KADOSH: Exactly.

4 THE COURT: Okay.

5 MR. KADOSH: Exactly, Your Honor. From the  
6 third-party Cibao Meats.

7 THE COURT: Okay.

8 Did he specifically deny using the Gmail email  
9 account for business at the deposition?

10 MR. KADOSH: He was asked, what are -- you know, in  
11 a few different ways, are these the only emails that you use  
12 for business purposes? And he confirmed the limited set,  
13 which did not include the Gmail.

14 THE COURT: Okay.

15 MR. RAYMOND: Your Honor, could I just add one fact  
16 here.

17 THE COURT: Yeah.

18 MR. RAYMOND: Just to put this in context, because  
19 I took the initial deposition of Mr. Zuluaga.

20 What happened was we served a document demand, and  
21 we were told that Mr. Zuluaga and his company had no  
22 documents because his hard drive had somehow been destroyed.  
23 So there were no documents that related to our claims in the  
24 lawsuit.

25 And that's when we asked the Court to let us take

1 this spoliation deposition to find out what happened.

2 THE COURT: Right.

3 MR. RAYMOND: So I took that deposition. And  
4 Mr. Zuluaga told his story about how his hard drive was hurt,  
5 and he went into Best Buy, and he decided to buy a new one,  
6 and he took the old one, and rather than search it and  
7 download it, he threw it away, because it was less expensive  
8 to do that.

9 So at that point, we were just told he -- and he  
10 said everything that was relevant to communications about  
11 this case was on that hard drive and on that email account,  
12 and so we weren't going to get anything.

13 And Your Honor actually suggested to us at a  
14 subsequent conference that we go to third parties, we  
15 subpoena third parties --

16 THE COURT: Right.

17 MR. RAYMOND: -- to see if we can get the other  
18 side.

19 We did that. And we got this -- this plethora of  
20 emails that showed that Mr. Zuluaga had specifically asked  
21 Cibao Meats, who was designing his website, to copy our email  
22 from -- to copy our trademark off of my client's website and  
23 do all this stuff. These were obviously incredibly  
24 significant documents to our case. So once we found all  
25 that --

1 THE COURT: I'm sorry. Counsel, can I interrupt?  
2 I got a note from my deputy clerk.

3 Can I interrupt you just to state your name for the  
4 record, again, because obviously, I think you guys know this,  
5 what will happen, is you'll order the transcript and the --  
6 the transcription service, it makes a lot easier for them to  
7 identify the speaker.

8 MR. RAYMOND: Right. I'm Peter Raymond, also from  
9 Reed Smith.

10 THE COURT: All right. Thank you.

11 So I'm sorry. I didn't mean to interrupt.

12 MR. RAYMOND: So that was the context.

13 And then we discovered -- we found through the  
14 third parties, we got all this very significant discovery,  
15 and that's what we want to now follow up with Mr. Zuluaga on  
16 spoil- -- we don't want to go back to his testimony in the  
17 last deposition. We didn't know at the last deposition -- we  
18 had no documents. We were just trying to find out why there  
19 were no documents.

20 Now we've found out there were these very  
21 significant documents, which, you know, maybe were  
22 purposefully destroyed, maybe not. I don't know. But -- but  
23 that's what we want to now explore with Mr. Zuluaga. That's  
24 all we want to do. And under the spoliation issue, we just  
25 want to be able to take it the next step, because now we know



1 and he knows -- because we produced them to him and we have  
2 this exchange of emails that he -- were destroyed in his hard  
3 drive, but were not -- actually some of them were destroyed  
4 in the third party's hard drive.

5 THE COURT: Right.

6 MR. RAYMOND: But enough of them were produced that  
7 showed what actually happened here, and it's very significant  
8 for our case up to -- on the merits and on the spoliation  
9 issue. So I just wanted to put that in context as to why we  
10 need to continue the spoliation deposition, but not to redo  
11 what we already covered.

12 THE COURT: Right. You don't want to cover old  
13 ground. You want to talk about the documents you've gotten  
14 since then.

15 But let me ask this --

16 MR. RAYMOND: And new email address that we found  
17 out that had some additional documents --

18 THE COURT: Different than the Gmail account? --

19 (Simultaneous conversation)

20 THE COURT: Different than the Gmail account? Or  
21 the Gmail account --

22 (Simultaneous conversation)

23 MR. RAYMOND: No. No. I mean the Gmail.

24 THE COURT: Okay. Hold on. I'll certainly let you  
25 speak, Mr. Ingber.

1 I am not looking for your litigation strategy, and  
2 we don't have time anyway for you to give me your deposition  
3 outline.

4 But can you give me a sense of what it is overall  
5 that you're trying to understand or would be trying to  
6 understand in the subsequent deposition on spoliation? You  
7 have what you have from the third parties. Makes sense. It  
8 shows that Mr. -- from what you're telling me -- that  
9 Mr. Zuluaga was using this Gmail account to conduct business  
10 and that he did with Cibao Meats?

11 MR. RAYMOND: Cibao Meats.

12 THE COURT: Cibao Meats. I get all of that.

13 But what is left to discover on the spoliation  
14 front? It's not a -- hardly a surprise that you got  
15 documents or correspondence email from him based on what we  
16 know -- or what's been represented so far from third parties  
17 and not from him.

18 So what -- where are we still going on the  
19 spoliation issue that we don't already know?

20 MR. RAYMOND: Well, there's an issue of intent in  
21 spoliation. And certainly that's something we need to  
22 explore with him, which we didn't know -- I mean, we -- we  
23 got his intent to destroy the hard drive, but we didn't know  
24 what was on that hard drive. He obviously knew what was on  
25 that hard drive, and it was, you know, directly relevant to

1 | our claims here. So we want to explore that with him,  
2 | certainly. And we want to explore some of these documents.  
3 | That really goes to the merits more than -- so it's not  
4 | really so much spoliation. I mean, obviously -- want to  
5 | explore those documents with him that we didn't have before.

6 | THE COURT: All right.

7 | MR. RAYMOND: But to the extent that that also  
8 | relates to spoliation, we don't want to be precluded from  
9 | asking questions, just because we took a deposition a year  
10 | and a half ago before we had any of the documents just about  
11 | the destruction of his hard drive. That's really all we  
12 | asked him about in the first deposition. So....

13 | THE COURT: All right.

14 | MR. KADOSH: Your Honor, if I could add one more  
15 | thing, and this is Sam Kadosh from Reed Smith.

16 | We also received the production of metadata from  
17 | Network Solutions.

18 | THE COURT: Oh. Right. You were starting to  
19 | talking about that.

20 | Go ahead.

21 | MR. KADOSH: And that metadata --

22 | THE COURT: Wait. Who's Network Solutions?

23 | MR. KADOSH: Network Solutions is Latinfood's email  
24 | provider.

25 | THE COURT: Okay.

1 MR. KADOSH: Okay? And so we received metadata  
2 which both had -- you know, it showed that certain emails  
3 exist on the Network Solutions server and also showed that  
4 certain emails don't exist, which we know of their existence  
5 and they should exist based on the story that Mr. Zuluaga  
6 told --

7 THE COURT: Wait. I'm sorry. Tell me that again.

8 MR. KADOSH: Okay.

9 THE COURT: We know about -- what you're saying is  
10 the response you got, the metadata you got from Network  
11 Solutions says that certain emails exist on the server.

12 MR. KADOSH: Right. And they're also --

13 THE COURT: Okay. And then presume-- -- which  
14 presumably means they're recoverable? If -- off of the  
15 server? Or not.

16 MR. KADOSH: I don't know.

17 THE COURT: Okay. What's the second?

18 MR. KADOSH: I don't know, but it shows that --  
19 possibly, but the second -- and I think this is perhaps the  
20 more interesting point is Mr. Zuluaga told a certain story at  
21 his first spoliation deposition about his hard drive crashes,  
22 which explains how all of his email -- I'm sorry -- all of  
23 the documents that he had saved on his computer were gone.

24 But then he also said that he had failed to change  
25 an autodeletion policy. Right?

1 THE COURT: I guess prior to the hard drive  
2 crashing.

3 MR. KADOSH: Correct.

4 THE COURT: Right.

5 MR. KADOSH: He had failed to change an  
6 autodeletion policy.

7 Now, subsequent to that point, we know there were  
8 certain communications between Mr. Zuluaga and Cibao  
9 Meats -- okay? -- because we received those communications  
10 from Cibao Meats. Right? And certainly we would have  
11 expected those to have been produced by Latinfoods. They  
12 were not produced by Latinfoods, and the -- and there was  
13 also no metadata produced in Network Solutions, which means  
14 even after the spoliation deposition, there were certain  
15 emails that were intentionally deleted -- or -- yeah, that we  
16 believe were intentionally deleted. And we want to be able  
17 at the -- at the deposition to use this Network Solutions  
18 metadata to test and to examine Latinfood's narrative about  
19 how it came to be that all of their documents were gone.

20 THE COURT: Okay. All right.

21 Mr. Ingber, I have to say they give me a pretty  
22 good argument as to why there is good cause to at least, in a  
23 limited fashion, revisit the spoliation issue.

24 MR. INGBER: Your Honor, Mark Ingber speaking.

25 This is -- it's nice to hear, Your Honor. If they

1 had responded to my question when I asked for what they were  
2 going to say, you know, we probably could have resolved this  
3 issue. You know, but, again, because -- because of, you  
4 know, discourse and, you know, we didn't get -- we got the  
5 response you had referenced.

6 By the way, Your Honor, my client had mentioned at  
7 his spoliation deposition, that he did have -- there might be  
8 other email accounts that he had that he didn't recall. And  
9 we found out about it, and it was a very limited number, and  
10 we provided an explanation to that.

11 Anything that wasn't provided to them and wasn't  
12 covered, certainly -- or anything new that they found, let me  
13 ask away. There's really not an issue about that. We just  
14 don't want to go into the same questions about how your hard  
15 drive got destroyed and what steps you took to do this.  
16 Again, everything -- nearly everything has been a  
17 re-produced. My client voluntarily reached out to all his  
18 vendors, got all the -- got most of the documents. There  
19 were subpoenas that were sent out to Cibao and other vendors.  
20 All of the documents that were, if it appears and my client's  
21 testify- -- all the documents or the vast bulk of them have  
22 been re-produced, live documents that are damaging to my  
23 client that were produced. So we're not trying to hide  
24 anything. And there's clearly no intent.

25 But let me ask away, Your Honor.

1 THE COURT: Fair enough.

2 So, look, I'm going to allow question --  
3 questioning Mr. Zuluaga regarding spoliation, limited to the  
4 new information.

5 To be clear, though. If, for example, plaintiff's  
6 counsel were to ask at the deposition, "do you recall  
7 testifying as to X," I don't regard that as violating my  
8 limitation on staying with new information, as much as it is  
9 place in context for the witness to answer.

10 If there is any issue about that, counsel can call  
11 me from the deposition.

12 Okay.

13 Discovery Dispute Number 3, the plaintiff's demand  
14 for defendant's financial records. The -- plaintiff wants  
15 documents regarding Latinfood's sales, costs, and profits  
16 specifically for the years 2014 to 2018; specifically  
17 Latinfood's bank statements, QuickBook files and invoices,  
18 arguing it's relevant, which is one of the remedies that  
19 Industria seeks is disgorgement of Latinfood's products [sic]  
20 from selling products with the Zenu and Ranchera trademarks.

21 To date, the defendants have produced some of the  
22 documents of Latinfood's sales and profits and essentially  
23 argue that the plaintiffs should rely on them.

24 Now, one area of concern -- I don't know who will  
25 be addressing this as on the plaintiff's side, Mr. Ingber

1 tells me that he provided the summaries to you folks in  
2 August 2017, and this was not raised again and specifically  
3 plaintiffs didn't raise this again until May 28th of this  
4 year, which is, obviously, almost two years later.

5 What's the -- is that true?

6 MR. RAYMOND: Your Honor, this is Peter Raymond.  
7 Let me respond to that, because Mr. Kadosh came into the case  
8 during that period. I've been involved since the beginning.  
9 We -- associate worked on the case. Left the firm, so  
10 Mr. Kadosh took over.

11 It is true. But discovery was still ongoing, and  
12 to be frank about it, I looked at the discovery at some point  
13 as we were getting closer to the end about what we had, and I  
14 saw that all we had were these few pages with summaries of  
15 what the alleged cost and expenses were, and I turned to  
16 Mr. Kadosh and said we need to make sure we get the  
17 underlying documents. We have the right to -- you know, to  
18 see the underlying documents. It's not a -- you know,  
19 Mr. Ingber argues that it's some -- it's a big problem for  
20 them. All they've got to do is put all the documents in a  
21 room. They don't have to do anything. We'll go look at  
22 them. But I think we clearly have the right to look at the  
23 actual documents and not just accept their summary so that we  
24 can challenge their alleged costs. You know, the way -- as  
25 you well know, the way this works is we as plaintiff in a



1 trademark case have to put in the revenue figures. They then  
2 have to put in the costs they claim go against those revenues  
3 to determine profits. But we get to cross-examine that and  
4 challenge those costs and whether they're relevant and  
5 whether they're -- and whether they're necessary. But if we  
6 can't see the underlying documents, we have no way of doing  
7 our job. We can't -- we can't challenge their costs to  
8 determine what the actual profits were. We'd just be  
9 accepting Mr. Ingber's summaries. I'm not suggesting they're  
10 wrong, but I don't know. It seems to me it's our job to look  
11 at the underlying documents so that we can have the ability  
12 to challenge whether the cost numbers they put in really  
13 related to these products or to something else.

14           And every trademark case I've ever had, we've  
15 always gotten all those -- on both sides. I've given them,  
16 and I've looked at them. I mean, that's how -- you have to  
17 be able to do that to be able to do that process of putting  
18 in revenues and challenging costs and expenses against them  
19 to determine profits.

20           THE COURT: No, I --

21           MR. RAYMOND: That's all we're asking to do. And  
22 we are not asking them to produce them or Bates-number them.  
23 They can tell us what room they're in, and we'll send someone  
24 to there to look at them. We don't want to create any big  
25 problem here.

1           But the delay was -- was my fault, but discovery  
2 was ongoing and --

3           THE COURT: Yeah, but there were deadlines for  
4 getting discovery responses and then raising disputes  
5 regarding written discovery that, frankly, I think, by any  
6 measure, this is long past. Is it not?

7           MR. RAYMOND: Well --

8           THE COURT: If you're -- your argument essentially  
9 is what we got was from the defendants was insufficient, and  
10 we're entitled to a better production.

11           That's why the scheduling order had deadlines to  
12 raise disputes about written discovery. By any measure, that  
13 deadline came and went without plaintiffs raising this. I  
14 don't necessarily disagree that the information, which very  
15 well may constitute evidence, is important, given the  
16 plaintiff does -- I checked the complaint -- is pleading a  
17 disgorgement remedy. But the fact is it's after almost two  
18 years. Right.

19           MR. RAYMOND: Well, everything -- there were a lot  
20 of reasons why things sat, Your Honor. But both sides served  
21 new discovery requests throughout this process. And we  
22 served a new discovery request to get these specific  
23 documents as well. Those summary documents were served in  
24 response to initial and general discovery requests. But both  
25 sides served several more sets of discovery requests. And

1 these were in response -- we specifically asked for these  
2 specific documents so that we could challenge their --

3 THE COURT: I'm get back to you, Mr. Ingber. Don't  
4 worry.

5 MR. INGBER: All right.

6 THE COURT: So... all right. Let me move to a  
7 separate question.

8 Am I right that what the plaintiffs want are the  
9 bank statements, QuickBook files, and invoices for 2014 to  
10 2018? Is that -- I'm trying to get an understanding  
11 because -- look, I understand you want documents regarding  
12 sales, costs and profits. Those are very broad terms. In --  
13 in more concrete terms what is that the plaintiffs are  
14 looking for.

15 MR. RAYMOND: We really want to be able to  
16 challenge whatever costs, expenses they claim go against the  
17 revenues to determine the profits. We can accept their  
18 revenue figures, but it's the costs and expenses that we'd  
19 like to see the underlying documents.

20 THE COURT: Why did you need bank statements?

21 MR. RAYMOND: Bank statements just -- well, bank  
22 statements really go to the revenue side more than the cost  
23 side, but --

24 THE COURT: Yeah, it's going to be redundant with  
25 their QuickBook files, isn't it?

1 MR. RAYMOND: Assuming the QuickBook files are  
2 accurate, then they should just be redundant. The costs and  
3 expenses, we have no detail on at all other than gross  
4 numbers that they claim are the costs and expenses on these  
5 product sales. They have no backup for that whatsoever.

6 THE COURT: All right. Is there anything else  
7 plaintiff wanted to tell me on this?

8 MR. RAYMOND: No. That it, Your Honor. Thank you.

9 THE COURT: No? All right.

10 So, Mr. Ingber, I'm happy to hear you. I know you  
11 argue undue burden, which, frankly, I thought was  
12 unpersuasive, because there's not a whole lot of burden in  
13 producing electronic records. But even if there were,  
14 plaintiffs have offered that they'll send somebody to come  
15 and review so that you don't actually have to produce  
16 anything.

17 And, I mean, I think -- I think we can agree, but  
18 maybe you'll disagree -- that the -- at least some -- some  
19 subset of the discovery the plaintiffs seek is relevant, is  
20 it not?

21 MR. INGBER: Not necessarily, Your Honor.

22 By the way, understanding the initial request was  
23 over two years ago, Your Honor, notwithstanding that, in the  
24 letter, they asked us to update these figures in May of this  
25 year, Your Honor. We updated the figures for them to provide

1 | them whatever they -- what they had wanted updated figure- --

2 |         THE COURT: On your summaries.

3 |         MR. INGBER: Yes, Your Honor.

4 |         It was only after that, Your Honor, that they came  
5 | that with, well, we need all this other information, bank  
6 | statements, invoices, QuickBooks files. You know, it just --  
7 | it was like right on the deadline of the discovery end date.  
8 | And all of a sudden, you know, we were -- we were dealing  
9 | with a situation that should have been asked, you know, years  
10 | ago and, frankly, wasn't even replicated.

11 |         THE COURT: Let me tell both sides, though. The  
12 | argument about that -- I can't remember -- it was July 25th  
13 | deadline for discovery or whatever it was in July -- I  
14 | understand, but that is unpersuasive to me for three  
15 | reasons -- or, I guess, really two reasons. One, of course,  
16 | the Court has the power to extend the deadline, but, two,  
17 | both sides are still looking for such extensive discovery  
18 | that it's hard to take your reliance on -- or argument that  
19 | the denial deadline -- this is going to factor into one of  
20 | the later discovery disputes -- that the discovery deadline  
21 | is so compelling when both sides are looking for additional  
22 | discovery.

23 |         So -- go ahead. I'm sorry.

24 |         MR. INGBER: Your Honor, we had -- we had --  
25 | between counsel, we had come to a compromise where --

1 THE COURT: This is the one-month QuickBooks  
2 summary?

3 MR. INGBER: Exactly. For each year, Your Honor,  
4 so that they can see, you know, what was going on.

5 By the way, Your Honor, the quick -- the QuickBook  
6 entries, the client only entered the sales data contained in  
7 the invoices and entered it into QuickBook, not the invoices  
8 themselves, Your Honor.

9 THE COURT: Right.

10 MR. INGBER: So, again, this was something that was  
11 suggested by plaintiff's counsel. We agreed. And then it  
12 was removed. So --

13 THE COURT: Here's -- look, I certainly appreciate  
14 the efforts in a case that has had no shortage of discovery  
15 disputes, the efforts to try and reach a compromise on one.

16 My strongest sense, though -- and I don't -- don't  
17 know for sure is that the plaintiffs never waived the right  
18 to get the underlying data. This was going to be an interim  
19 stopgap to try and resolve this discovery dispute. Right?  
20 My point being the underlying documents probably were always  
21 going to be critical here.

22 MR. INGBER: We had also, Your Honor -- the -- by  
23 the way, Your Honor, I'm -- if -- I'm sure you've seen the  
24 stipulation on the facts. The defendants -- the plaintiffs  
25 have no sales in the U.S. of any -- of any type, not just the

1 Zenu and Ranchera ones that are in dispute. They have never  
2 had any physical presence in the U.S., Your Honor, for sales.  
3 Their damages, Your Honor, are so beyond speculative that it  
4 doesn't merit doing this.

5 We have also offered to bifurcate the case,  
6 Your Honor, so that they could ask, you know, intrusive  
7 damage questions, you know, later on.

8 But, again, based on their stipulation of facts  
9 alone, Your Honor, that are attached as Exhibit N, there's no  
10 basis for them to get this -- this intrusive --

11 THE COURT: But isn't part -- I hear you.

12 But isn't part of their claim that they can't enter  
13 the U.S. market because your client has the 942 registration  
14 for Zenu?

15 MR. INGBER: Actually, Your Honor, there's been  
16 testimony to the effect -- and we've seen documentation,  
17 Your Honor, that they couldn't get their products in well  
18 before my client was even registered in the U.S., that they  
19 were having problems with getting it past the FDA,  
20 Your Honor. That they were -- that there were issues with --  
21 other issues, Your Honor, about the product not being  
22 satisfactory.

23 THE COURT: Okay. That may very well be, and it'll  
24 play out perhaps at trial as to whether the -- whether that  
25 would have rendered their entry into the market impossible.

1 But I certainly don't know how that's going to play  
2 out, my point being, I have a hard time understanding the  
3 argument that because they weren't in the U.S. market during  
4 the 2014 and 2018 time period, they can't possibly seek  
5 disgorgement profits from the -- alleged improper use of the  
6 Zenu mark. Right?

7 MR. INGBER: Well, Your Honor, under the Lexmar  
8 case, they need to -- they need to have shown an economic  
9 zone of interest here. And based on all the cases that are  
10 subsequent to it, Your Honor. They're so far beyond that,  
11 they're so -- they're so far speculative, Your Honor, that  
12 it's -- while it might have been sufficient during the motion  
13 to dismiss stage, Your Honor, the discovery and the  
14 stipulation of the facts show exactly otherwise. It's far  
15 beyond speculation to say that they couldn't enter the U.S.  
16 market, Your Honor, because of a registration that our client  
17 had.

18 THE COURT: I understand that. And it sounds like  
19 you've got a -- you know, an argument that you can make at  
20 summary judgment.

21 But, obviously, at the discovery stage, it's hard  
22 for me to conclude, is it not, that these records aren't at  
23 least relevant, given the scope of Rule 26?

24 MR. INGBER: They're -- they're relevant in the  
25 sense, Your Honor, but that the -- the cost -- the cost



1 information, everything was entered into the -- the  
2 QuickBooks and the summaries, Your Honor. The document --  
3 the info that they're going to want is not going to be  
4 anything other than the summaries, which is why we had  
5 offered to provide them with a -- with a one-month annual  
6 presentation, Your Honor, which is what they had offered.

7 Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 All right. The first issue is the fact that paper  
10 discovery was exchanged in this case going back to 2017. And  
11 at that point, the defendants produced their own summaries of  
12 the invoices and revenue, and it was not until May 28, 2019,  
13 that plaintiffs complained that the summaries were  
14 insufficient.

15 The Court would be within its right to conclude  
16 that plaintiffs, having failed to raise this issue in a  
17 timely fashion and given the deadline in the scheduling order  
18 for raising written discovery disputes, that they should not  
19 be permitted to seek relief at this time.

20 But I do find not only is the discovery that  
21 they're looking for relevant, but that it is particularly  
22 important -- and I understand the defendant's argument that  
23 the relief that the plaintiff is seeking is speculative,  
24 perhaps because of FDA issues and the -- what the defendants  
25 argue would be plaintiff's inability to establish an economic

1 zone of interest.

2 But while those are arguments that may go to the  
3 merit of the parties' claims, that certainly is not the  
4 standard for discovery. And not only does the Court regard  
5 these records as relevant, but it regards them as actually  
6 quite significant on the issue of damages.

7 Certainly, the law supports the production of  
8 financial records for costs, expenses, overhead, and profit.  
9 For example, in the W.L. Gore v. Tetratex Corporation case,  
10 which the plaintiffs cite, 1989 WL 144178 at pages 4 to 5,  
11 (E.D. Pa. 1989), and that was a patent infringement case, but  
12 that distinction is not particularly significant. But there  
13 the court awarded plaintiff discovery of all documents  
14 evidencing the defendant's costs, expenses, overhead and  
15 profits. The court found the discovery was plainly relevant,  
16 given the broad interpretation of Rule 26 and the trial  
17 court's substantial discretion in fashioning appropriate  
18 damages.

19 Here, we're dealing with the Lanham Act. And as I  
20 said, the patent infringement issues in Gore are not  
21 particularly important because under § 11.7 of the Lanham  
22 Act, the party may provide for and the court may award a  
23 number of different types of damages, including recovering  
24 defendant's profits and compensation for the plaintiff's  
25 damages, among other remedies.

1           In this case, Industria seeks, among other things,  
2 disgorgement of defendant's profits, and so much of the  
3 records that it seeks would be necessary to calculate  
4 Latinfood's profits. See, for example, Complaint Docket  
5 Entry 1 at page 9, ¶ 3, in the prayer for relief section  
6 where the plaintiffs seek disgorgement.

7           Accordingly, the Court is satisfied that this  
8 information is not only relevant but is critical to the  
9 plaintiff's ability to establish damages.

10           Under Federal Rule of 26 A 2 (B), of course --  
11 strike that --

12           Under Rule -- Fed. R. Civ. P. 26(a)(2)(C) -- I'm  
13 sorry -- strike that. I'm looking at it wrong.

14           Under Rule 26 and 16, this Court has substantial  
15 discretion to order the production of discovery and set a  
16 schedule of proceedings. The issue here really is whether  
17 the plaintiffs have established good cause to seek this  
18 information at this time. And the Court finds, particularly,  
19 given the number of disputes in this case and the fact that  
20 the parties did serve additional written discovery requests  
21 on each other, that good cause has been satisfied and so, in  
22 the exercise of its discretion, will nonetheless consider  
23 this issue.

24           Moreover, I would note that the Third Circuit in  
25 the matter of Meyers v. Pennypack Woods Homeownership, 559

1 F.2d 894 (3d Cir. 1977) ruled that the exclusion of important  
2 evidence, which certainly some of this discovery may very  
3 well be, is "an extreme sanction not normally to be imposed  
4 absent a showing of willful deception or flagrant disregard  
5 of a court order." See Pennypack, 559 F.2d at 904 to 905.

6 Accordingly, I find that at least certain of this  
7 discovery that the plaintiffs seek is relevant and that they  
8 have established good cause for seeking it, notwithstanding  
9 the fact that they waited almost two years to circle back to  
10 it.

11 Now, defendants have argued, one, that the  
12 summaries themselves should be sufficient, particularly given  
13 that the defendants entered the sales data on the invoices  
14 into the QuickBooks; not the invoices them, so stated, hard  
15 copies. So, essentially, the plaintiffs already have what  
16 they need.

17 Respectfully, I disagree. I do believe that the  
18 QuickBook files and the invoices themselves are significant  
19 to the plaintiff's ability to properly establish, if they  
20 ultimately do prevail, recovery of the defendant's profits or  
21 disgorgement.

22 Defendants also argue undue burden. The problem --  
23 or the shortcoming there is that a showing of undue burden  
24 requires a very specific and particularized showing. It's  
25 not enough, essentially, to say that it would be burdensome,

1 | because the reality is most discovery and certainly discovery  
2 | in larger-scale commercial disputes is at least some degree  
3 | of burdensome -- or burden. The standard for undue burden is  
4 | actually quite high.

5 |           Moreover, what we're talking about here presumably  
6 | with both the -- at least as to regards to QuickBook files,  
7 | those are electronic records and should not be particularly  
8 | difficult, even though the invoices aren't hard-copy, we're  
9 | talking about there a discrete category of documents for  
10 | which the plaintiff has actually offered to send somebody to  
11 | review and copy themselves. So I cannot agree with the  
12 | plaintiffs -- or defendants, rather -- respectfully, that  
13 | undue burden is a serious consideration here.

14 |           I'm not satisfied, though, that the plaintiffs have  
15 | adequately articulated a basis to get the defendant's bank  
16 | statements themselves. There's been no particularized  
17 | showing that the bank statements are going to show them  
18 | anything that the QuickBook files and invoices themselves in  
19 | terms of revenue won't -- or overhead or expenses.

20 |           Moreover, I would be concerned because there's no  
21 | particular plan that's been put in front of me that would  
22 | actually limit what exactly would be reviewed in terms of  
23 | Latinfood's bank account records.

24 |           So I'm going to grant the plaintiff's request for  
25 | relief and limit it to the QuickBook files and the invoices.

1           The parties will meet and confer to determine the  
2 most efficient way for the production of those materials.

3           With that, we turn to Discovery Issue 4, which is  
4 extending the discovery deadline, which also really bleeds  
5 into Discovery Issue 5, which itself, actually, as I regard  
6 it, is in two parts, because there is -- so the fourth  
7 discovery issue is about extending the discovery deadline.  
8 As I see it, Issue 5 (A) is the defendants want to get more  
9 depositions because they argue that the 30(b)(6) witness was  
10 not competent to testify. And then Issue 5 (B) is the  
11 defendants want additional Industria 30(b)(1) witnesses,  
12 including but not limited to Industria's CEO Diego Medina.

13           So let's see if we can figure out the most  
14 practical of working through this.

15           Why don't we take -- we're going to set the issue  
16 of additional discovery aside. I think that's probably going  
17 to be largely moot or otherwise taken care of in resolving  
18 these additional issues.

19           So the defendants, Mr. Ingber, you want additional  
20 depositions because you argue that Mr. Salazar, the  
21 plaintiff's marketing and sales director, was incompetent and  
22 essentially -- I don't like to use that word -- not a  
23 competent witness on a number of the topics. Right?

24           But here's the question -- actually, I'm going to  
25 start off with both sides. Defense counsel, Mr. Ingber, you

1 tell me that there was a proposed -- that the plaintiff  
2 proposed a stipulation of facts to resolve not only the  
3 Salazar issue, but the additional 30(b)(1) witnesses that you  
4 sought over the defendant -- or plaintiff's objection.  
5 Right?

6 MR. INGBER: Your Honor, Mark Ingber.

7 We had proposed something that we thought could  
8 resolve these issues. It was rejected by the defendants --  
9 by the plaintiff's counsel.

10 THE COURT: Well, from the joint letter, all I  
11 could glean -- because, frankly, I don't think the plaintiffs  
12 mentioned at all in the letter, you did, was that they raised  
13 the concept. You volunteered to do the proposed stipulation  
14 of facts. You showed it to them. They protested that. But  
15 the time you got it to them, which was, I think, July 25th or  
16 somewhere around there, there wasn't enough time to review it  
17 before the close of fact discovery.

18 Is that about how it went?

19 MR. INGBER: No. This was presented to them well  
20 in advance of that.

21 THE COURT: I am not worried about that. Here's  
22 what I'm trying to figure out.

23 MR. INGBER: I think that's moot, Your Honor, by  
24 the way. Frankly.

25 THE COURT: Why? Tell me why.

1 MR. INGBER: Why?

2 THE COURT: Yeah.

3 MR. INGBER: Because it was -- it's become very  
4 clear to me that what we were looking for was very far from  
5 what they were going to accept, Your Honor.

6 THE COURT: Okay.

7 MR. INGBER: It was -- and that's why, you know --  
8 that's why the -- it hasn't really been brought up --

9 THE COURT: All right. So it's not simply that  
10 after the plaintiffs complained -- and, again, I don't even  
11 know what I read in the joint letter.

12 But the way the joint letter read, it sure sounded  
13 like after the plaintiffs complained that they didn't have  
14 enough time to review it with the looming fact discovery  
15 deadline approaching, it read like the issue was dropped and  
16 nobody revisited it. If that was all the case, then I was  
17 going to make you folks revisit it. But if it's moot and  
18 you're both confident that it's moot, then we'll dive into  
19 these issues, because what I want to do today is I want to  
20 resolve all of these disputes, and then from where I stand,  
21 certainly as to written discovery, there -- had -- should not  
22 be another discovery dispute. And I will scrutinize very  
23 closely why I would possibly have another discovery --  
24 written discovery dispute this late in the game and after all  
25 of these issues that we're resolving today, that has not been



1 previously raised.

2 And, frankly, from where I stand, this should  
3 resolve even the question of who's getting deposed, meaning  
4 in terms of fact discovery, the only possible dispute that  
5 should come my way, if one at all, would be a dispute at a  
6 deposition.

7 So let's go into, then, the issue of the 30(b)(6)  
8 and Mr. Salazar's performance as a 30(b)(6) witness.

9 Are you arguing that the additional witnesses are  
10 necessary because Mr. Salazar was a -- basically a not --  
11 unprepared -- or not qualified 30(b)(6) witness? Or are you  
12 seeking to depose Mr. Medina and -- I have the whole list  
13 here somewhere -- Jiménez, Ospina, Martha Ochoa, and Moreno  
14 regardless of the 30(b)(6) issue?

15 MR. INGBER: Your Honor, pursuant to Exhibit N,  
16 Your Honor, we had an agreement --

17 THE COURT: Wait. N as in Nancy?

18 MR. INGBER: N, like in Nancy. This is Mark Ingber  
19 speaking, Your Honor.

20 We had an agreement in writing that we would start  
21 off with the 30(b)(6) witness, and then we unilaterally would  
22 have the right to depose further witnesses as we saw fit,  
23 Your Honor.

24 THE COURT: Okay.

25 MR. INGBER: We have the Salazar deposition,

1 Your Honor, where he testified to no knowledge essentially  
2 about anything, Your Honor. Whatever we asked him --

3 THE COURT: There's a very big dispute about that  
4 that we're going to get into.

5 But --

6 MR. INGBER: But we asked him about Marquillas,  
7 Your Honor. He said that Marquillas -- I'm looking at his --  
8 Exhibit F, Your Honor, page 56. He says Marquillas --

9 THE COURT: Wait. What page?

10 MR. INGBER: It's page 54, Your Honor. Marquillas  
11 is a supplier of Industria. I do not work with the  
12 suppliers.

13 No, he answered.

14 I asked him who works with the suppliers?

15 Santiago Jiménez, he responded.

16 Do you know -- I asked him, "Do you know if  
17 Mr. Jiménez was alerted to Marquillas's complaint?"

18 He said, "I don't know if he was alerted directly."

19 I asked him, "Have you ever spoken to Mr. Jiménez  
20 about what happened with Marquillas?"

21 He says, "We have talked directly to our  
22 attorneys."

23 I asked him, "Did you speak with Mr. Jiménez about  
24 this personally?"

25 He said no.

1           Marquillas is important, Your Honor, because this  
2 is -- this is who the plaintiff has identified as having  
3 notified them in October of 2013 about the defendant's  
4 alleged infringing activities. We have been completely  
5 stonewalled, Your Honor, in trying to get information about  
6 this. We couldn't get it from Salazar.

7           THE COURT: When you say "on this," you mean  
8 Marquillas?

9           MR. INGBER: Exactly. We -- we even asked later on  
10 in that deposition, I asked plaintiff -- I asked defendant --  
11 plaintiff -- on page 108, Your Honor, of that same exhibit,  
12 "Do you know the name of a person that Marquillas that  
13 communicated this to Industria?"

14           He responded, "I don't know."

15           He -- I asked him, "Who would know?"

16           And, again, he said, "I don't know."

17           "Can you find out?"

18           "I don't know:

19           And then Mr. Raymond said, "We'll provide you with  
20 a name if we have it. Thank you."

21           They have a name, Your Honor. We have a protective  
22 order in place. We're trying to get this information on  
23 discoverable facts. Okay? And we've been completely  
24 stonewalled. You've -- if you've read the deposition,  
25 Your Honor, of Salazar, you saw about the improper speaking

1 objections, the coaching --

2 THE COURT: Well, look, here's what I'm going to  
3 say on that: If there's a dispute, as the scheduling order  
4 made clear, you call me -- the parties -- the aggrieved party  
5 calls me from the deposition.

6 But that's a far cry from whether Mr. Salazar was a  
7 prepared witness or not.

8 MR. INGBER: So after that deposition, Your Honor,  
9 that's when we came about -- hey, we're not going to -- you  
10 know, we had a fundamental difference about whether he was --  
11 he was an acceptable 30(b)(6) witness. That's when we came  
12 up with this proposed stipulation of facts. But that  
13 essentially went nowhere.

14 We -- the Arango deposition, Your Honor, that was  
15 on -- and he's the Cordialsa, the defendant -- another  
16 third-party defendant in this case. Luis Arango. His  
17 deposition was on July 11. He identified that he had gone to  
18 Diego, that he had gone to --

19 THE COURT: Medina.

20 MR. INGBER: To Colombia, met with the plaintiffs,  
21 and that Diego Medina had given instructions. We see his  
22 name here --

23 THE COURT: Well, he basically kicked it over to  
24 Moreno.

25 MR. INGBER: Exactly. He kicked over to Moreno.

1 And we want to -- we want to depose him too. We said, let's  
2 start with Moreno.

3 THE COURT: "Him" being Medina or Moreno or both?

4 MR. INGBER: Pardon?

5 THE COURT: You mean -- when you say we want to  
6 depose him too, who's "him"?

7 MR. INGBER: We want to depose -- we said, okay.  
8 He's a busy executive. You know, there's -- the plaintiff is  
9 trying to put a protective blanket, Your Honor, on all these  
10 witnesses that -- that have been named in the initial  
11 disclosures and as witnesses, Your Honor.

12 These people -- Your Honor, if we get to trial,  
13 these witnesses are potentially just going to pop up, and  
14 we're not going to have any opportunity to have deposed them,  
15 even though I sent deposition notices out to all these  
16 individuals over a year ago.

17 So -- but we're willing to start, Your Honor,  
18 with -- with this Moreno fellow. Okay. But we need to have  
19 him here, Your Honor. All of their witnesses speak Spanish,  
20 Your Honor. You've seen the problems that we've had taking  
21 depositions here with speaking objections and everything  
22 else. We need to have this person in front of us.

23 Now, all of a sudden, notwithstanding that we have  
24 translation issues. We have -- my client has to pay for the  
25 translation. So we want this person here, but now we're

1 seeing, oh, we'll agree, but he has to be the last, and we'll  
2 only do it via video.

3 THE COURT: Wait. Let me stop you right there,  
4 Mr. Ingber.

5 I'm not -- if we get into sort of the back and  
6 forth of the attorneys' failed negotiations, we're never  
7 going to get out of here.

8 What I want to know quite simply is on substance,  
9 you argue, one, Salazar was a poor Rule 30(b)(6) witness, and  
10 even when he did testify, he identified specific individuals  
11 who would know in the form of, for example, Jiménez. Right?

12 MR. INGBER: Correct, Your Honor.

13 THE COURT: Now, I've got to be honest with you,  
14 though. I reviewed the Salazar deposition excerpts, at least  
15 what I had. And you're right, at least as to Marquillas, he  
16 kicks the issue over to Jiménez, but I'm certainly not  
17 prepared to conclude, based on everything that's been put in  
18 front of me, that he was a completely unprepared witness.

19 Moreover, the plaintiffs tell me that you  
20 essentially terminated the deposition early so whereas the  
21 parties had negotiated two full days, 14 hours, you only  
22 proceeded for about eight hours and left uncovered a number  
23 of subjects.

24 And, for example, even in your side of the joint  
25 letter, all you argued was that he did not know the pleadings

1 in the case, which made me wonder why does that even matter.

2 So I need some more specificity as to what Salazar  
3 specifically was unprepared to testify to in terms of  
4 30(b)(6) deposition.

5 MR. INGBER: Well, I just gave you one example,  
6 Your Honor, about Marquillas. I tried to get examples of --

7 THE COURT: So Marquillas is a good argument for  
8 getting Jiménez. I get it.

9 MR. INGBER: Okay. So that's a good argument for  
10 getting him.

11 We have the Arango deposition mentioning all these  
12 meetings that took place in Colombia, Your Honor, about the  
13 facts involved here, about what they did when they found out  
14 about my client, the plaintiffs -- plaintiffs' counsel is  
15 trying to say, well, you don't know him. You don't need  
16 anybody else because Luis Arango from Cordialsa testified,  
17 and anything else is cumulative.

18 We are allowed to --

19 THE COURT: Well, hold on, hold on, hold on. Let's  
20 put this in context.

21 What they argue -- they argue that in response to  
22 your demand to depose Diego Medina, they essentially argue  
23 that at Arango's deposition, he testified about Medina's  
24 involvement and that by virtue of, one, that Medina's  
25 involvement was limited to -- I think it was an email -- or a

1 communication, essentially, where he basically hands it off  
2 to Mr. Moreno. That's how they raised that issue -- or in  
3 the context in which they raised that issue.

4 MR. INGBER: Well, Mr. Arango also testified that  
5 he met with -- with Mr. Medina.

6 THE COURT: Yeah, who told him basically go talk to  
7 Moreno.

8 MR. INGBER: Okay. So exactly. We want to start  
9 with Moreno. Let's start with Moreno. Let's start with  
10 Moreno. Let's see what he has. If he's going to stonewall  
11 us, Your Honor, and says I don't know or I don't -- I don't  
12 remember, you know, then we have to move on from there. If  
13 Moreno gives us what we want, Your Honor, which is all that  
14 we want, we might be finished with these people, except, of  
15 course, again, we want -- we want this Jiménez guy, because  
16 we need somebody to testify about Marquillas.

17 THE COURT: Actually, you know what? Let's do  
18 this. I want to take a -- I've got to take a two-minute  
19 break, because I have to respond to a -- call that I have to.

20 But we're going to take -- it should only be  
21 ability two minutes.

22 I want you to -- when we resume, I want you to be  
23 able to be prepared come back and tell me exactly what it is  
24 plaintiff want.

25 Are you looking for another Rule 30(b)(6)



1 deposition? Or are you looking simply for these witnesses,  
2 Medina, Jiménez, Ospina, Ochoa, and Moreno.

3 MR. INGBER: Okay, Your Honor.

4 THE COURT: All right. And then we'll pick it up  
5 from there, because I think that'll help sort of narrow  
6 down --

7 (Recess: 11:13 A.M. to 11:24 A.M.)

8 THE COURT: All right. So, Mr. Ingber, I'm going  
9 to throw this right back into your hands.

10 What exactly is it at this point that the defendant  
11 is looking to do in terms of these depositions?

12 MR. INGBER: Your Honor, firstly, you referenced  
13 that you had read the transcript of the Salazar.

14 THE COURT: Yeah, at least what was given to me,  
15 yeah.

16 MR. INGBER: Yeah, exactly, Your Honor.

17 Yeah, we didn't provide you with the entire  
18 transcript, Your Honor. We just provided you with excerpts.  
19 If I went through the entire transcript, Your Honor, there  
20 would be too many references.

21 Your Honor, there were certain allegations made  
22 that we tried to question Mr. Salazar about, about alleged --  
23 the defendant -- excuse me -- the plaintiff says defendant  
24 attempted to prepare 400,000 of the plaintiffs' labels.

25 THE COURT: Wait, wait, wait. Sorry.

1 I understand that's advocacy.

2 What is it exactly that the defendant wants? And  
3 then we'll work from there.

4 MR. INGBER: Our first preference, Your Honor, is  
5 to begin with a substitute 30(b)(6) deposition, somebody that  
6 was prepared and can respond to the topics and without being  
7 improperly coached, instructed, and without improper speaking  
8 objections.

9 THE COURT: I'll make clear, I am not making any  
10 finding about the proper or improper nature of that.

11 I will simply remind counsel of two things. One,  
12 if there is a dispute, you've got to call me from the  
13 deposition. Two, any objections have to be in a short,  
14 nonspeaking, nonargumentative manner.

15 I will -- I did not review it enough -- I did  
16 review it enough to draw some concerns about -- or have some  
17 concerns about the interplay coupled with a bunch of the  
18 discovery dispute letters between counsel, but certainly not  
19 nearly enough to make any conclusions about that.

20 So -- all right. So you want a substitute 30(b)(6)  
21 deposition. Is that -- is that a essentially it?

22 MR. INGBER: Well, that's essentially -- that's our  
23 first preference, Your Honor.

24 THE COURT: Okay.

25 MR. INGBER: And, again, I understand that you're

1 not -- I mean, could we at least agree, Your Honor, that  
2 the -- that the plaintiffs' counsel is telling him -- telling  
3 on the record that he can talk to his client in the middle of  
4 the deposition, notwithstanding that he --

5 THE COURT: Not while there's a question pending,  
6 no, you cannot.

7 MR. INGBER: Okay. So, Your Honor.

8 THE COURT: That's universally true, by the way.  
9 That's not limited to that deposition.

10 MR. INGBER: Right.

11 Your Honor, our first preference is to begin with  
12 the 30(b)(6). If we get -- if we have a proper witness,  
13 Your Honor, that may obviate everything.

14 Certainly, Your Honor -- and we put it on the  
15 record, even at -- during our last hearing, Your Honor, where  
16 we -- where we said on March 21st, just so you're aware, we  
17 initially noticed multiple witnesses for focus, but we did  
18 agree, Your Honor, that we would begin with the 30(b)(6) for  
19 the -- for each of the Industria and Cordialsa witnesses, and  
20 at that point, we could determine -- the defendants would  
21 determine what we needed additional witnesses.

22 So we've been saying this all along, Your Honor.  
23 We wanted to start with the proper 30(b)(6) deposition. If  
24 we -- if that's not going to be granted, then we want to  
25 pursue the other -- the other deponents, beginning, again,

1 we'll pick -- we'll start with Mr. Hernando Moreno. We'd  
2 like this Santiago Jiménez. Hopefully that will end it,  
3 Your Honor.

4 But I'm -- I'm not going -- we don't want to be in  
5 a situation where we're told, hey -- which is what the  
6 plaintiffs' counsel said, we'll give you Moreno, but he's the  
7 last one, and you have to just stop.

8 Your Honor, this is -- we want a complete record,  
9 Your Honor. We're allowed to take deposition testimony  
10 that's not cumulative, Your Honor. If we're going to be  
11 precluded from taking the deposition testimony of witnesses,  
12 Your Honor, then these witnesses that have been cited in  
13 their initial disclosures as witnesses should be precluded  
14 from testifying at trial.

15 Thank you, Your Honor.

16 THE COURT: I understand completely.

17 One follow-up question or clarification. Am I  
18 correct that what you're arguing is your first preference is  
19 to depose -- to take another 30(b)(6) deposition. And that  
20 the defense will seek additional witnesses, specifically  
21 Jiménez, Ospino, Ochoa, Moreno, those identified in the  
22 plaintiffs' initial disclosures, only if the 30(b)(6) witness  
23 is not competent to testify on a subject or more subjects.

24 Is that right? Because I don't want to go through  
25 this whole exercise only to have you come back and go, well,

1 we still need to depose Mr. Moreno, or we still need to  
2 depose Mr. Jiménez, regardless of whether the 30(b)(6)  
3 witness was competent or not.

4 MR. INGBER: Your Honor, I think that's correct, if  
5 they provide -- if this witness testifies competently and  
6 provides knowledge, if, for example, if, Your Honor, the  
7 30(b)(6) witness has spoken to Santiago --

8 THE COURT: Jiménez.

9 MR. INGBER: -- Jiménez about what had happened  
10 during their conversation. Apparently, Marquillas, fine.  
11 But if a 30(b)(6) witness comes and shows up and says, I  
12 don't know, you have to ask the other guy, you know, then I  
13 have to get -- I have to ask the other guy.

14 THE COURT: Right. Except by virtue of them  
15 testifying in a 30(b)(6) capacity, that could be a witness  
16 who was never a party to a particular conversation. You  
17 understand that. Right?

18 MR. INGBER: But --

19 THE COURT: That would be a 30(b)(1) witness.

20 MR. INGBER: But he still has to testify --

21 THE COURT: He's done his due -- he or she's done  
22 their due diligence --

23 MR. INGBER: Exactly --

24 THE COURT: -- they've spoken to the appropriate  
25 people.

1 MR. INGBER: Exactly.

2 THE COURT: To deal with -- look, I don't know  
3 about the Marquillas subject itself, but to deal with those  
4 subjects that were noticed or topics that were noticed in the  
5 deposition notice. Right?

6 MR. INGBER: Right.

7 THE COURT: Okay.

8 MR. INGBER: So that's where we are, Your Honor.

9 THE COURT: All right.

10 MR. INGBER: Again, if we can't get him -- again,  
11 even if we get him, if we don't get the information from a  
12 substitute 30(b)(6), you know, we want to do what we said all  
13 along, go to the next witness until we get the answer.

14 THE COURT: And then presumably, if there were a  
15 dispute about the competence or not of that 30(b)(6) witness,  
16 you folks would raise that with me. Right?

17 MR. INGBER: I'm sorry. I didn't hear the --

18 THE COURT: If there were a dispute -- if you later  
19 came back and claimed the 30(b)(6) witness was not competent  
20 to testify or was not prepared to testify about a particular  
21 subject, you would come back to me and the -- obviously, if  
22 the plaintiffs disagreed, you folks would come back for me to  
23 decide that.

24 MR. INGBER: In the same way that we've been  
25 writing ever since we took the Salazar witness --

1 testimony --

2 THE COURT: I'm aware.

3 Okay.

4 MR. INGBER: Thank you, Your Honor.

5 THE COURT: Counsel.

6 MR. KADOSH: Your Honor, you've asked Mr. Ingber, I  
7 would say four or five times -- maybe more -- about what  
8 issues he specifically needs additional testimony on. He  
9 still hasn't answer that question. Right? We hear these  
10 broad conclusory statements Mr. -- you know, that Mr. Salazar  
11 was an insufficient witness, inadequately prepared. But I  
12 don't think that's been borne out at all.

13 And so, really, the question is what are the  
14 issues? What does he need testimony on?

15 The only really particular issue that he's  
16 identified, Your Honor, is this issue of identity of this  
17 person at Marquillas.

18 And just to take a step back and provide the  
19 background on that, our complaint alleged that at a certain  
20 point, Marquillas, who is a label producer, produced food  
21 labels for Industria, contacted us, contacted Industria and  
22 informed us that somebody -- who was trying to order exact  
23 copies of our labels.

24 Now, that person was either Mr. Zuluaga or  
25 Mr. Zuluaga's mother. Right? So this whole question of who

1 is the identity of the person at Marquillas, to me, is a  
2 little bit -- first of all, it's not -- I don't really see  
3 how it's relevant to the case at all, but, you know,  
4 Mr. Zuluaga knows --

5 THE COURT: There was no objection at the  
6 deposition based on relevance, so that's obviously waived.

7 Go ahead.

8 MR. KADOSH: Mr. Zuluaga knows the identity of that  
9 individual. But if, Your Honor, is the really the one issue  
10 that Mr. Ingber needs, who the identity of the -- of the  
11 individual at Marquillas, we could obtain that. I don't  
12 think we need to fly somebody from Colombia for a two-day  
13 deposition and a day of preparation in order to obtain the  
14 identity of one individual at Marquillas.

15 THE COURT: All right. I appreciate counsel's  
16 arguments.

17 MR. KADOSH: I'm just -- add one more point,  
18 Your Honor.

19 THE COURT: Go ahead. Yeah, sure.

20 MR. KADOSH: You know, there's been a lot of -- I  
21 think broad talk about the inadequacy of Mr. Salazar's  
22 deposition, and I think Your Honor noticed already that the  
23 deposition was ended after two hours on the second day, even  
24 though I --

25 THE COURT: Yeah, I only noticed that -- I said



1 that in the context of that's what you folks had told me.

2 MR. KADOSH: Yeah --

3 THE COURT: Obviously, I wasn't there, don't have  
4 the complete deposition transcript, so I don't know that for  
5 sure, but I -- I didn't hear also any argument from the  
6 defense.

7 Instead, he argued that it was because Salazar  
8 wasn't ready.

9 MR. KADOSH: And, Your Honor, if you look at  
10 Exhibit 2 to the joint letter, that was the most recent  
11 correspondence that we had with Mr. Ingber about the adequacy  
12 of Mr. Salazar's deposition, and for every topic, right, for  
13 each -- we list every topic that Mr. Ingber claimed was not  
14 adequately covered, and we provided cites in Mr. Salazar's  
15 testimony by doing -- Mr. Ingber never provided a substantive  
16 response to this. He just kept, again, with a broad -- the  
17 broad -- --

18 (Simultaneous conversation)

19 THE COURT: Yeah, except, look, and I say this in  
20 the context of not having the entire deposition, but if, for  
21 example -- if Number 27, plaintiff's electronic storage  
22 practices, you say Mr. Salazar testified regarding this  
23 topic, including but not limited to the testimony at 32:22 to  
24 37:5, if, in fact, what Salazar testified was "I didn't deal  
25 with IT, that would go to IT person John Doe," I can't find,

1 assuming that was a noticed topic, that he was prepared  
2 testify as to, could I?

3 MR. KADOSH: I believe what he testified there was  
4 that, you know, he was aware that there were electronic  
5 storage practices.

6 THE COURT: You missed my point, Mr. Kadosh. And I  
7 appreciate it. If I were you, I'd make the same argument.  
8 And you remember the deposition transcript that well, all I  
9 can say is kudos.

10 But all I'm saying that without the full deposition  
11 transcript, I'm at a loss to evaluate whether the parties'  
12 discovery dispute letter essentially ends the inquiry.  
13 Right?

14 MR. KADOSH: I mean, you don't have in the record,  
15 Your Honor, a counterletter from Mr. Ingber saying, well,  
16 actually, your citation to this was inadequate -- right? --  
17 or the testimony's inadequate --

18 THE COURT: Sure.

19 MR. KADOSH: All you have are these general  
20 statements. And, again, I -- I started with this, and I'll  
21 end with this, that he hasn't identified specific issues  
22 that -- that he needs further discovery on. And all we hear  
23 is, well, we could start. This is truly what's so concerning  
24 is he says, well, we could start with this individual. And  
25 then, obviously, in that individual's testimony, some may --

1 or some nugget will come up, and I'll say we need further  
2 depositions. And each time that that happens, we have fly  
3 somebody up from Colombia, you know, for a two-day  
4 deposition, because they're all being translated, a day of  
5 preparation, it's tremendously costly. And that the federal  
6 rules have -- haven enshrined now the principle of  
7 proportionality. Where is the proportionality? If a name  
8 comes up once, right, like the CEO, his name came up once in  
9 a thousand documents that we produced, he was in one email  
10 saying, meet with another guy. And that's the basis that's  
11 proportional enough to fly the CEO up here? Even --

12 (Simultaneous conversation)

13 THE COURT: Whoa, whoa, whoa. The CEO's a whole  
14 different issue because of the --

15 (Simultaneous conversation)

16 MR. KADOSH: Yeah, I know, leaving aside the apex  
17 rule --

18 (Simultaneous conversation)

19 THE COURT: -- apex rule, which I haven't had to  
20 rule on yet, but that's a whole different issue.

21 But, look, here's where I frankly -- your  
22 proportionality argument, at least right now, falls flat.

23 You're the plaintiff. You're seeking very  
24 substantial relief against the defendant, relief that could,  
25 at least conceivably, include injunctive relief. It could

1 include hundreds of thousands, if not millions, of dollars in  
2 disgorgement or lost economic benefits to the plaintiff. So  
3 the prospect of spending -- I don't know -- a few thousand  
4 dollars to bring in a critical witness -- now, you can argue  
5 he's not critical, but then that's not a undue burden or  
6 proportionality. That's a straight relevance issue.

7           The argument that a few thousand dollars to fly a  
8 witness up here where you are the plaintiff seeking the  
9 relief is, frankly, less than persuasive.

10           But here's where -- and is there anything else?  
11 Because I'm -- I think you make a fair point, but I'm going  
12 to incorporate it into my ruling rather than -- I'd rather  
13 hear you first if there's something else you want to argue.

14           MR. KADOSH: Well, just the additional point,  
15 Your Honor, is that if you're going to argue any additional  
16 depositions, there are a couple of limitations, I think, we  
17 need to establish, the first being, we would like there to be  
18 whatever your -- your order's going to be, it to be final;  
19 like, this is, and this is -- you know, that's it. This is  
20 not the starting process of a new -- of another round of --

21           THE COURT: Well, let me ask this. He's -- that's  
22 part -- I had actually had a similar or related concern.  
23 That's why I asked Mr. Ingber if he gets this 30(b)(6)  
24 witness and if that witness is a competent witness, whether  
25 by agreement of the parties or if there's a dispute by my

1 ruling, he's not looking for anybody else, and he may -- very  
2 clearly said -- and if I'm wrong, Mr. Ingber, please correct  
3 me -- yes. If it's a competent 30(b)(6) witness, he's not  
4 going to be looking to depose Jiménez or anybody else.

5 Is that correct, Mr. Ingber? I want to be  
6 crystal-clear about that.

7 MR. INGBER: Your Honor, again, I don't want to  
8 make a flat-line denial. You know, I have to consult with my  
9 client, Your Honor. I -- I am hoping that, Your Honor. But,  
10 again, based on what I've seen so far, Your Honor, in  
11 connection with the pre- -- he still thinks that Salazar was  
12 a great witness. So presumably, he'll think that the next  
13 guy is a great witness. Everybody's a great witness.

14 Right. We've only taken one deposition of each of  
15 the corporate defendants here --

16 THE COURT: Wait, wait. No.

17 Earlier -- and this is why sometimes resolving  
18 disputes in this case is so difficult, because every time I  
19 think I understand an issue, I then wonder if I did at all.

20 I had understood -- and that's why when we took the  
21 break, I said, what is it? I want you to think about what it  
22 is exactly defendants want.

23 You came back and said -- or when I came back,  
24 rather, you said our first preference is a substitute  
25 Rule 30(b)(6) deposition.

1           And then I essentially said, am I correct in  
2 understanding if -- and to be clear, I don't know -- I think  
3 it's at least 30 topics that have been noticed? Is that  
4 right?

5           MR. INGBER: Yes. Yes, Your Honor.

6           THE COURT: Yeah. Somewhere in the order of 30  
7 topics. So we're not talking about an insubstantial number  
8 of topics for a Rule 30(b)(6). We're talking about very  
9 expansive number of topics.

10           But be that as it may, I said, and if that is -- if  
11 the 30(b)(6) witness is competent as to those issues, the  
12 defendant is not going to seek additional fact depositions.  
13 Is that right? Understanding that if there's a dispute  
14 between the parties, if the defendant believes that that  
15 30(b)(6) witness was not competent, that's what I'm here for.

16           I'm now hearing, for example, Mr. Ingber -- and  
17 this concerns me -- perhaps that you're trying to leave some  
18 wiggle room that you could conceivably have a 30(b)(6), a  
19 competent 30(b)(6) witness and still want fact depositions.  
20 And if so, fine, but let's at least address that today.

21           MR. INGBER: Your Honor, again, we said all along  
22 and it's been in all the papers, we want to start with a  
23 competent 30(b)(6) witness. After that, I will review it,  
24 Your Honor, and determine if we got sufficient satisfactory  
25 answers.

1           It's not my intent to go on and on with  
2 depositions, Your Honor, I would like to get the information  
3 so that we can move forward. Given what I've seen in this  
4 case, Your Honor, I suspect that we may need these two  
5 additional witnesses. Okay? And I can't -- I can't give you  
6 a broad statement, Your Honor. We've got to have -- our  
7 first preference, we have to start with the 30(b)(6) a  
8 satisfactory one.

9           THE COURT: But are you arguing that you may need  
10 the additional witnesses you're talking about, Jiménez and  
11 Moreno?

12           MR. INGBER: I suspect that, Your Honor.

13           THE COURT: Okay.

14           MR. INGBER: A total of three, Your Honor.

15           THE COURT: In addition to the 30(b)(6).

16           MR. INGBER: No, that's total. That's -- who's --  
17 who's this substitute 30(b)(6) and these two individuals.

18           THE COURT: Right. I understand. Right. That's  
19 why I said, in addition to the 30(b)(6).

20           MR. INGBER: Your Honor, our client, as you  
21 recognize, is facing serious charges here.

22           THE COURT: I get it. Hold on.

23           I have a follow-up question, though.

24           Are you arguing you need -- the defendants need  
25 Moreno and Jiménez because you anticipate an inadequate

1 Rule 30(b)(6) witness or in addition to a competent 30(b)(6)  
2 witness? And, again, I am not trying to -- I'm simply trying  
3 to understand the discovery issues in front of me, because  
4 otherwise I can't help you folks with a ruling.

5 MR. INGBER: Your Honor, they -- if they agree --  
6 perhaps, Your Honor, they could put both of these witnesses  
7 as their 30(b)(6) witnesses, Your Honor, and have them both  
8 testify. They're not limited to one 30(b)(6) witness. They  
9 could have both of these individuals testify on the topics  
10 that they're familiar with, Your Honor. And presumably one  
11 of these people -- these are high executives, Your Honor.  
12 They should -- if we -- perhaps if we could designate these  
13 two individuals as 30(b)(6) witnesses, then he could be done.

14 THE COURT: Look, I'm certainly not going to tell  
15 the defendant who the relevant relative witnesses it needs to  
16 depose are, and I am not going to -- I would give the parties  
17 time to meet and confer on that, if that's what you're  
18 looking to do.

19 So, then, in this iteration, what you're saying is  
20 if the defendants will designate Moreno and Jiménez as the  
21 30(b)(6) witnesses -- although we'll be satisfied -- is that  
22 right? Although that makes me want to -- why wouldn't you  
23 just seek to waive the 30(b)(6) and depose Moreno and Jiménez  
24 as 30(b)(1)s?

25 MR. INGBER: Well, the 30(b)(6) witnesses,



1 | testifies as to the corporation, Your Honor.

2 | THE COURT: Right.

3 | MR. INGBER: So that's the distinction.

4 | THE COURT: Right. But it sure sounds like from  
5 | what you're arguing, you believe that Jiménez -- or maybe do  
6 | hybrid 30(b)(6) and 30(b)(1), it sounds like you're arguing  
7 | that Jiménez and Moreno also have personal knowledge.

8 | MR. INGBER: Exactly, Your Honor. That's based on  
9 | my understanding. Based on what we've seen from the Arango  
10 | testimony, I'm hoping that Moreno, if we bring him here,  
11 | Your Honor, he's going to be able to fill in the blanks about  
12 | all these meetings with Diego -- it wasn't just one meeting;  
13 | they had multiple meetings, Your Honor. He's mentioned only  
14 | once in the correspondence, but --

15 | THE COURT: Arango.

16 | MR. INGBER: -- has testified that he had met with  
17 | him multiple times.

18 | THE COURT: Yeah, hold on. I'm sorry.

19 | Who 's mentioned only once? You're talking about  
20 | Moreno or --

21 | MR. INGBER: Diego -- Diego Medina is mentioned --

22 | THE COURT: Right. The CEO.

23 | MR. INGBER: -- in one of the documents that was  
24 | produced by plaintiffs.

25 | THE COURT: Yes.

1 MR. INGBER: But Mr. Arango, who is the Cordialsa  
2 30(b)(6) witness, said that he had met with -- he had met  
3 with Diego Medina on multiple occasions.

4 THE COURT: Okay. But what does that mean for the  
5 individuals that you want to depose?

6 MR. INGBER: So if -- did -- is he going -- if we  
7 bring him, we would start with the Moreno. If he's competent  
8 to testify about everything that Diego Medina knows, then we  
9 don't need -- then that would satisfy that.

10 THE COURT: Okay.

11 MR. INGBER: If he comes in and testifies, well, I  
12 don't know anything, like, Diego met with him separately,  
13 Diego never put anything in writing -- these people, by the  
14 way, Your Honor, the plaintiff, they docket all their calls.  
15 They have record of everything.

16 THE COURT: Industria, you mean.

17 MR. INGBER: Industria, yes. But somehow, when  
18 we're trying to get information on Marquillas, we have no  
19 information. There's no report. There's no log-in call.  
20 When they have these meetings, you know, we can't get any  
21 further information. It's just this constant -- again, they  
22 want everything that they want, Your Honor, and they want to  
23 hold our client accountable disgorgement on a 16-count  
24 complaint, but we can't get basic information.

25 THE COURT: Okay.

1 MR. RAYMOND: Your Honor, could I just add a couple  
2 of points here. First of all, in terms of proportionality,  
3 we haven't taken a single deposition yet, other than a  
4 spoliation deposition a year and a half ago. Mr. Ingber has  
5 stomped our various attempts to take Mr. Zuluaga's  
6 deposition, so we've had to have this fight just to get one  
7 deposition of one 30(b)(6) and 30(b)(1) witness.

8 On his side, we gave him a negotiated two-day  
9 deposition of Mr. Salazar, who is a very competent witness.  
10 He is the head of sales and marketing for our Zenu, Ranchero  
11 products in Colombia. He came and prepared with us for two  
12 days. We went through everything, really. We went through  
13 the topics. If you read through his whole deposition, they  
14 gave a great deal of testimony. This calling him the  
15 incompetent witness because he deferred to the lawyers and  
16 the IT people on a couple of issues is, frankly, absurd. He  
17 wasn't --

18 THE COURT: Well, are there -- are there -- I  
19 understand that.

20 Are there additional witnesses that you want to  
21 depose? I know you're obviously getting Zuluaga.

22 MR. RAYMOND: Well, I don't know. I mean, based on  
23 what Mr. -- what Mr. Ingber does, is as soon as anyone  
24 identifies somebody in a deposition, he says, now I've got to  
25 depose that person too. He still has not, all morning here,

1 identified what issue does he need Medina on, what issue does  
2 he need Moreno on? He said, because they were involved in  
3 some conversation. Well, those -- they were identified in  
4 the Cordialsa deposition. Cordialsa is only in this case,  
5 it's a third-party defendant --

6 THE COURT: Right. I'm aware.

7 MR. RAYMOND: -- his counterclaim. So this isn't  
8 about our multi-million-dollar claim against him. This is  
9 all about his counterclaim.

10 And, by the way, he's taken four or five  
11 depositions already on his counterclaim. It involves one  
12 conversation that took place in a Food Fair Supermarket,  
13 wherever it was -- in Texas, 2015; he's deposed everyone in  
14 that conversation. He's deposed a couple of bystanders to  
15 the conversation. Every name that comes up, he then has to  
16 depose them. And the last deposition took place after this  
17 letter was submitted, he served another deposition notice.  
18 We objected, and he said I'm going to go ahead and do it, so  
19 we went and had to send someone to attend the deposition a  
20 month or so ago, which we thought was totally improper, but  
21 he was going to do it anyway.

22 So my problem here is that this is just a fishing  
23 expedition. He said several times, I want to start with this  
24 guy, and that's what he's doing here. Every --

25 THE COURT: Well, wait a minute. Here is where --

1 here's where I have a problem with the fishing expedition.  
2 All right. Your own initial closures identified Jiménez is  
3 Industria employee with a -- having knowledge, as  
4 irrelevant -- having relevant knowledge under Rule 26 about  
5 the history of the Zenu mark, the product portfolio, and a  
6 number of other topics.

7 As to Moreno, he's pretty clearly a relevant  
8 witness or potentially relevant witness because Medina has  
9 unique and firsthand knowledge of the issues, at least  
10 insofar as -- sorry. I'm sorry.

11 Let me go back.

12 Arango himself testified that there was these  
13 meetings, but that in -- essentially, it was handed off --  
14 that Medina handed off responsibility about bringing Zenu's  
15 products in the U.S. to be sold by Cordialsa to Moreno.

16 I have -- I understand your argument that there's  
17 no deficiency in Arango's testimony, but that doesn't make  
18 render Moreno an irrelevant witness.

19 So my point being, you have a number of these  
20 witnesses that you yourselves have identified as relevant.  
21 How do I then say basically, that none these individuals  
22 other than -- within the broad scope of Rule 26, isn't  
23 sufficiently relevant to allow the plaintiff to depose  
24 them -- or defendants to depose them as a 30(b)(1) witness.  
25 I can't control who the -- who the plaintiffs or any party

1 designates as their Rule 30(b)(6). But I have a hard time  
2 fathoming how they're not at least potentially relevant under  
3 Rule 26 when you folks disclosed them.

4 MR. RAYMOND: Well, Your Honor, in our -- in our  
5 initial disclosures, as I always do, I try to name everybody  
6 who has any knowledge about the issues in the case, and many  
7 cases, it's very duplicative knowledge. But you name them  
8 all so that no one can argue later, wait a minute, you didn't  
9 tell us about that guy. That doesn't mean that anyone needs  
10 to depose all of these witnesses, because the information is  
11 largely duplicative.

12 And in this case, we presented as our 30(b)(6)  
13 witnesses the two people who knew the most about the issues  
14 we said. When we said Mr. Jiménez knows here, he could have  
15 asked Mr. Salazar. He did ask Mr. Salazar some of that  
16 stuff. And he had another day to ask Mr. Salazar anything he  
17 didn't get any answer on. But he -- he left at noon on the  
18 second day. We flew all those people up here. We were  
19 sitting there expecting to go all day. We negotiated hard  
20 over this two days. They initially wanted four days. But at  
21 noon on the second day, they said we're done. We said, okay,  
22 you know, we were ready go for the whole afternoon. He could  
23 have asked all these questions.

24 Instead, he's now saying, well, wait. I want to  
25 ask somebody else these questions.

1           So, look, I'm not trying to limit his right to  
2           discovery. I guess I just want to -- there needs to be an  
3           end to this, because if he took -- if he took four or five  
4           depositions over one conversation that took place in a store  
5           in 2015, he's going to always be able to come up with another  
6           reason, another meeting, another person who was identified.  
7           Tell us what issues we didn't -- that Salazar was asked about  
8           and didn't -- and didn't answer, and I'm happy to bring up  
9           another witness to answer those questions. But to leave it  
10          open-ended, like, he was an incompetent witness, I need  
11          another 30(b)(6) witness, he's basically telling me he's  
12          going to back and ask it all over again for the second guy.

13                 And Mr. Salazar -- I mean, we're happy give you the  
14          whole transcript, if you want it read it, but he testified  
15          for, you know, one full day and a couple of hours the second  
16          day, and, you know, he answered a lot of questions. No one  
17          person knows everything that goes on in a  
18          multiple-billion-dollar company. But, you know, he's -- he  
19          was the main guy who knew about what our sales of Zenu and  
20          Ranchera were in Colombia, which is all that's really  
21          relevant to this case. I mean we have claims against them.  
22          They have most of the knowledge of the facts that are  
23          relevant to the claims. As I say, he's taken tons of  
24          depositions on his counterclaim.

25                 So, again, I go back to what are the issues that he

1 needs more testimony on, and can we agree to one or maybe two  
2 witnesses that -- and that's it. And then we're done with  
3 this.

4 THE COURT: Well, what did you -- if -- if -- what  
5 if the plaintiff's response to Mr. Ingber's proposal to have  
6 Moreno and Jiménez testify as to -- as both 30(b)(6) and  
7 30(b)(1) witnesses, and I understand correctly, Mr. Ingber --  
8 and if I'm wrong on this, you've got it tell me -- and that  
9 essentially would, barring some unforeseeable development,  
10 that would constitute that sum total of the deposition.

11 Is that essentially what you are now offering?

12 MR. INGBER: In -- under that scenario, if they're  
13 competent, if they testify, if they've been properly educated  
14 on things that they don't have necessarily personal  
15 information, and if we're --

16 THE COURT: That are noticed in the note- -- in the  
17 deposition notice, yes.

18 MR. INGBER: And if we're not obstructed and we can  
19 just have a normal deposition where I can ask a question  
20 without being interrupted and coached, that would be my  
21 pleasure.

22 THE COURT: That is not -- that last part does not  
23 move me a bit. Nobody sought court relief. And, frankly, I  
24 didn't -- I looked at the deposition enough -- that was both  
25 sides. Okay?



1                   So, but, yes -- the answer to my question is yes?

2                   MR. INGBER: I feel it would be yes, Your Honor.

3                   MR. RAYMOND: Your Honor, can we ask one more  
4 thing, which is that he tell us in writing what subjects? I  
5 mean, I can't -- bringing two people and prepare each of them  
6 for 30 subjects that --

7                   THE COURT: I agree.

8                   MR. RAYMOND: -- they don't know about many of  
9 those subjects. They only know limited things. We gave them  
10 the best 30(b)(6) witness. If there are certain subjects  
11 that he didn't get an answer out of Mr. Salazar on -- and not  
12 ones he didn't ask Mr. Salazar, because that's not fair, the  
13 ones he didn't get an answer on, then, you know, we'll  
14 find -- if it's those two witnesses or somebody else, that  
15 someone can answer those questions.

16                   But -- but it can't just be open-ended that he gets  
17 just another two 30(b)(6) witnesses. I mean, do we have to  
18 prepare each of them --

19                   THE COURT: No. I don't -- I think it would be  
20 manifest -- here's -- I think it would be manifestly  
21 unreasonable to expect of Moreno and Jiménez to be fully  
22 prepared as to all 30 topics in addition to whatever they  
23 might know in their personal capacity.

24                   I do think that it's only fair -- and this would be  
25 true of any deposition notice, Rule 30(b)(6) deposition

1 notice -- that the topics to some extent be -- so that  
2 they're not -- des- -- they're not testifying overlapping --  
3 in an overlapping fashion.

4 MR. INGBER: Your Honor, Mark Ingber.

5 Again, you don't have the whole deposition  
6 transcript. It's --

7 THE COURT: And let me be clear. I'm not deciding  
8 that, folks. I have spent an enormous amount of time  
9 preparing for this hearing today.

10 What I am not doing -- and both sides had a full  
11 opportunity to put that transcript in front of me and make  
12 whatever arguments off of it. You did not. You gave me what  
13 you gave me, and I've reviewed it thoroughly for today.

14 What I'm not going to do is now go all the way back  
15 and start over by reviewing Salazar's full deposition  
16 transcript to decide who's right. It sounds to me like we  
17 have at least a promising potential resolution of the issue.

18 MR. INGBER: Your Honor, I agree. But the devil's  
19 in the details, as always, Your Honor. We intend, if we  
20 could get these two witnesses -- not -- I hear Mr. Raymond's  
21 mentioned it might be other witnesses. No, we want these two  
22 particular people. And we're going to -- we're going to --  
23 we're going to set forth the topics. We're not -- this is  
24 not like -- again, we got so many answers that said "I don't  
25 know." If we got an "I don't know," Your Honor, we're

1 entitled to ask somebody else if they know. Okay? If he  
2 answered and it just wasn't a great answer because, so be it.  
3 But, again, it's replete with "I don't knows" -- "I don't  
4 know," "ask my attorneys," "ask my attorneys." So that's  
5 the -- that was the extent of the whole deposition,  
6 Your Honor. And that's why I left early, because -- because  
7 of that.

8 THE COURT: I got it. I got it.

9 Here's -- you know, this is a little bit  
10 interesting in the sense that normally a party notices the  
11 subjects and leaves it to the producing party to designate  
12 who's going to testify.

13 It sounds like the plaintiff very much wants to --  
14 sorry. I get confused because normally the plaintiffs sit  
15 next to the jury.

16 It sounds like the defendants very much want  
17 Jiménez and Moreno to testify. It also sounds, frankly, like  
18 the plaintiffs are willing to contemplate producing Jiménez  
19 and Moreno to testify.

20 The concern I have is the division of the topics  
21 under Rule 30(b)(6). And what -- because while I agree, it  
22 is manifestly unfair to expect both Moreno and Jiménez are  
23 going to testify or be prepared to testify as to -- both as  
24 to the same 30. That would defy the entire purpose of  
25 Rule 30(b)(6).

1           How we ensure that Jiménez would testify as to  
2 certain topics and Moreno would testify as to the other  
3 topics that don't overlap with what Jiménez is testifying to  
4 or the other one's testifying to, that is, it seems to me,  
5 what -- for this to work needs to be sorted out.

6           MR. RAYMOND: I would ask that Mr. Ingber give us a  
7 list of those topics, and we will consult with these  
8 witnesses, first, to see whether they know anything about the  
9 topics. They certainly don't know everything about all 30 of  
10 those topics. It sounds like, based on whatever Mr. Salazar  
11 said, there's -- or Mr. Arango said, there's something  
12 specific -- I just don't really know what it is, but there's  
13 something specific they want from these two witnesses, I  
14 would ask that Mr. Ingber put that in writing to us. We can  
15 talk to those witnesses, and if they know something about  
16 those subjects, you know, then we will produce them. I'm not  
17 trying to stop from taking discovery. But it's -- I don't  
18 think it's fair to say that we've got to subject two more  
19 30(b)(6) -- I mean, we get to determine who our 30(b)(6)  
20 witnesses are. He doesn't get to say who our 30(b)(6)  
21 witness should be. We gave him who we believed was the best  
22 30(b)(6) witness that we had. So if he wants these two guys  
23 on specific subjects, I would ask that he be directed to tell  
24 us what those subjects are, and I will respond in writing and  
25 say which subjects they have knowledge of, and then we can

1 produce them to testify about those things.

2 MR. INGBER: Your Honor, Mark Ingber.

3 We had sent on July 12th, we had sent a second  
4 amended notice of deposition to Diego Medina with the  
5 specific topics that we wanted to speak to him about. But  
6 they wouldn't even look at it.

7 THE COURT: Well, because they were taking a  
8 position that there was no basis to depose Medina.

9 MR. INGBER: Exactly. So we've already sent --

10 THE COURT: And, frankly, you haven't articulated a  
11 persuasive one for me. But that's a whole separate issue  
12 under the apex rule.

13 But my point being, what is the list of topics as  
14 to Diego Medina have to do with this? Are you arguing that  
15 those are the topics now that would form the Rule 30(b)(6)  
16 notice? I am not sure what the relevance is.

17 MR. INGBER: Your Honor, this is a -- this is a --  
18 this is a tough nut to crack. Okay?

19 THE COURT: Yeah, but we're going to crack it,  
20 because we have to -- this case is three years old, folks.  
21 We have to get to the bottom of this.

22 MR. INGBER: Your Honor --

23 THE COURT: And, frankly, if the parties would have  
24 more productive meet-and-confers, we probably could resolve  
25 it.

1 MR. INGBER: It's -- unfortunately, Your Honor --  
2 Mark Ingber, again. It's very difficult. I'm able to make  
3 decisions on the fly because of all the bureaucracy in  
4 dealing with -- which they themselves acknowledge,  
5 Your Honor, that they can't -- they can't get back to me  
6 right away. They have to go through people who don't speak  
7 English --

8 THE COURT: Look, I don't want to -- I'm not -- I'm  
9 sorry I even brought it up, because I'm not looking to peel  
10 back the onion on the meet-and-confer. And -- it would  
11 hardly be the first case where I have a large corporation  
12 that -- or large transnational corporation, but I'm not  
13 interested in dissecting the reasons why prior  
14 meet-and-confers were less than, you know, completely  
15 successful.

16 All I want to do is try and reach a resolution of  
17 this today, because --

18 MR. INGBER: Your Honor --

19 THE COURT: -- you folks are going to -- my concern  
20 is keep coming back and keep coming back, and we're not going  
21 to get this -- we're going to find ourselves still as far  
22 away from getting fact discovery done in this case as we are  
23 now.

24 MR. INGBER: Your Honor, as a suggestion, the  
25 second amended notice of deposition to Diego Medina --

1 THE COURT: Okay.

2 MR. INGBER: -- we'll substitute Mr. Moreno's name  
3 for. It's a 30(b)(1) deposition.

4 THE COURT: All right. So you would --

5 MR. INGBER: A list of 12 topics, Your Honor.

6 THE COURT: But how do I know that Moreno is the  
7 competent witness to testify as to those 12 topics?

8 MR. INGBER: Well, this is the witness that the --  
9 that the plaintiffs' counsel has been offering. They even  
10 offered in their report here, Your Honor, that he would --  
11 that he would be the witness.

12 MR. RAYMOND: We offered as a compromise, we'd  
13 produce one witness, Mr. Medina, if that would end this.

14 MALE SPEAKER: Moreno.

15 MR. RAYMOND: Mr. Moreno. I'm sorry.

16 That's all that we offered to do as a compromise  
17 to -- not as a starting point, but as a way to try to end  
18 this so we don't end up with --

19 THE COURT: But, wait. Did you offer Moreno as a  
20 witness to testify as to those topics?

21 MR. INGBER: No, Your Honor.

22 MR. RAYMOND: No, Your Honor. I just -- we just  
23 said that as a compromise in our letter, we could produce  
24 this one person to testify, if that will end it. But now  
25 he's naming all sorts of other people, so ...

1 MR. INGBER: End it. I'm sorry, Your Honor. End  
2 it. Again, we have discoverable witnesses. They want to put  
3 a protective blanket. We want to --

4 THE COURT: No, Mr. Ingber, I understand that. But  
5 trying to understand exactly what it is, though, that --  
6 that, first, that you want and that the parties can agree to  
7 has been a little bit like trying to grab smoke, because I  
8 can't tell -- I can't -- you -- right -- I think you'll agree  
9 with this. I can't dictate who they put up to deal with the  
10 30(b)(6) or testify as a 30(b)(6) witness.

11 Now, look, you could argue -- you could seek to  
12 depose Moreno, Jiménez, whoever, as a Rule 30(b)(1). And  
13 then the issue would be, you know, relevance under all the  
14 traditional considerations.

15 MR. INGBER: Your Honor.

16 THE COURT: Yeah.

17 MR. INGBER: As another suggestion, again, we would  
18 agree to depose these two 30(b)(1) witnesses, Moreno --

19 THE COURT: And Jiménez.

20 MR. INGBER: -- and Jiménez and put off, if we're  
21 satisfied with these two people -- and we'd like to be  
22 satisfied, then we don't need another 30(b)(6) substitute  
23 witness.

24 THE COURT: But what would the criteria for -- how  
25 do -- how do I independently determine -- so let's say you --



1 | you take, look, obviously, if you take their depositions and  
2 | you're satisfied, great. Everybody's happy.

3 | But let's assume you come back and say, we're not  
4 | satisfied.

5 | Well, not satisfied with what? They testified as  
6 | Rule 30(b)(1) witnesses based on what they know.

7 | I don't know at that point invariably when you  
8 | folks come back to me on a dispute, we're basically then just  
9 | kicking the can down the road to having another fight as to  
10 | whether Salazar was a viable 30(b)(6) witness.

11 | Now, look, thinking it through, that may not be a  
12 | terrible idea. But the -- what would dictate whether you are  
13 | satisfied?

14 | MR. INGBER: We would have to articulate a reason  
15 | to Your Honor, why we were unsatisfied. And you would have  
16 | to make the determination, and -- with all due respect.

17 | MR. RAYMOND: But don't we get to know in advance  
18 | so we have some idea what to prepare these people for. I  
19 | mean, it's --

20 | THE COURT: Well, he's not going to --

21 | (Simultaneous conversation)

22 | MR. RAYMOND: -- to come up with some subject --

23 | (Simultaneous conversation)

24 | THE COURT: Well, wait, no. He's not noticing as  
25 | 30(b)(6) witnesses. He's noticing as 30(b)(1) witnesses.

1 MR. INGBER: Correct.

2 MR. RAYMOND: Well, good, then. They'll testify  
3 about what they know. And if they don't know something, then  
4 that's not a reason to say, well, now I need more  
5 depositions. He's now saying those are the people he wants,  
6 and they have the knowledge that he wants, then -- then that  
7 we can live with. But -- but then he can't come back and  
8 say, well, wait they didn't testify to some subject on the  
9 30(b)(6) list because I am not going to prepare them for all  
10 those things, because they're not 30(b)(6) witnesses.

11 MR. INGBER: Your Honor, Mark Ingber.

12 But if they testify as Arango said, hey, it's  
13 Moreno is the one that knows. I can't be precluded from  
14 saying, well, you know, plaintiffs' counsel wants to be done  
15 with this. I don't want to go on, but if they gives me a  
16 discoverable name, I mean, I'm entitled to pursue that. I  
17 mean, I'm sorry. We can't just cave anywhere.

18 THE COURT: Wait, wait, wait. Tell me that again.  
19 I'm sorry.

20 MR. INGBER: Okay. If the -- if we ask this  
21 Jiménez guy, Santiago Jiménez, hey, tell me about the  
22 Marquillas -- you know, the Marquillas conversations, Salazar  
23 said you were in charge of all of that, well, I don't know,  
24 but XYZ knows.

25 So do they -- is there a gotcha here, you know? Do

1 they say, oh, well, you said this was the last one. I can't  
2 find out. I can't pursue this.

3 THE COURT: Right.

4 MR. INGBER: So ...

5 THE COURT: I understand.

6 MR. RAYMOND: But his list of topics has -- for  
7 Mr. Medina has plaintiff's Zenu and Ranchera trademark  
8 applications.

9 THE COURT: No, as I -- as I regard it, those  
10 topics would be off the table -- right? -- because --

11 MR. RAYMOND: Okay.

12 THE COURT: -- Medina's not testifying, at least as  
13 of right now and, frankly, that would be a very big issue,  
14 because defendant had his chance to argue for that and fell  
15 well short of the apex rule.

16 But with the Medina topics would be off the table,  
17 because he's deposing -- if I understand, correctly,  
18 Mr. Ingber, what you're trying to do is you want to depose  
19 Jiménez and Moreno as 30(b)(1) witnesses and then essentially  
20 see if that gets you far enough to where you don't care about  
21 the 30(b)(6). Is that right?

22 MR. INGBER: Hopefully, Your Honor. We did send an  
23 amended -- we sent a deposition notice to Hernando Moreno,  
24 Your Honor. We have topics. We've given it to them already.

25 THE COURT: I'm really confused. Moreno is a

1 30(b)(1) or a 30(b)(6).

2 MR. INGBER: 30(b)(1).

3 THE COURT: How did you send a list of topics to a  
4 30(b)(1) witness? Moreno knows what he knows. He has no  
5 independent duty, then, because he's not speaking for the  
6 corporation, to go out and do independent research in  
7 preparation for the deposition. Right?

8 MR. INGBER: 30(b)(1), Your Honor.

9 THE COURT: Right.

10 MR. INGBER: As fact witness.

11 THE COURT: Right. A fact witness has no  
12 independent duty to go out and do research in advance of --  
13 he's not testifying for the corporation.

14 MR. INGBER: No, we ask him questions, Your Honor,  
15 about what -- what was discovered in the documents that the  
16 plaintiff produced and what Arango said about, hey, Medina --  
17 Medina designated Moreno, Hernando Moreno to be in charge of  
18 this. So we specifically focus on -- focus on questions  
19 related to that, Your Honor.

20 THE COURT: No, I understand that.

21 But if hypothetically, so hypothetically Moreno  
22 said, I don't recall, he hasn't dis- -- he hasn't failed to  
23 discharge his duty. He didn't have an independent reason to  
24 go out and do research. He's not a 30(b)(6). Right?

25 MR. INGBER: Okay.

1           THE COURT: Now, you would then come back and  
2 say -- might come back and say, "well, Judge, he doesn't  
3 remember anything," frankly, my response to that would be,  
4 well, it sounds like you've got really good cross if  
5 plaintiff tries to put him up at trial, but he didn't fail to  
6 discharge some duty under Rule 30(b)(1). Right?

7           MR. INGBER: We believe, Your Honor, that there are  
8 written records, because they keep lots of written records.  
9 So it would be implausible, Your Honor, to think that the  
10 president -- or the CEO of your company assigns you a topic,  
11 and you don't have any recollection of it.

12           THE COURT: Right. Fair. Totally different issue,  
13 though.

14           All I'm saying is you send topics to the 30(b)(1)  
15 witness, we expect you to be able to testify about X, Y, and  
16 Z. Right?

17           MR. INGBER: As to these meetings --

18           THE COURT: Okay.

19           MR. INGBER: -- as to what happened.

20           THE COURT: But he doesn't have -- unlike Rule --  
21 first of all it's not even -- I mean, it's not even required  
22 under Rule 30(b)(1), but unlike, in any event, Rule 30(b)(6),  
23 where the subpoena's directed to the corporation and requires  
24 the responding party to designate the appropriate person to  
25 deal with the topics you've noticed, if Moreno -- you could

1 give the plaintiff -- a party could -- I could issue a  
2 Rule 30(b)(1) deposition notice and not list any particular  
3 topics or list a bunch of topics. But in responding to the  
4 deposition, you would come in and testify, and you can  
5 argue -- you could answer, obviously, you have an obligation  
6 to tell the truth -- I don't know. I don't remember. You  
7 say, well, did you do anything to prepare for today? And you  
8 say no. You haven't failed to discharge any duty under  
9 Rule 30(b)(1), unlike Rule 30(b)(6). Right?

10 MR. INGBER: Well, Your Honor, we're going to  
11 include a document request that will force him to look and  
12 see if he has anything.

13 THE COURT: A document request? What?

14 MR. INGBER: Attach -- that he should come and  
15 produce any documents, Your Honor, as part of the 30(b)(1).  
16 That he should bring with him any documents relating to any  
17 of these meetings.

18 THE COURT: No, no, no. We're --

19 MR. RAYMOND: We've already produced all the  
20 documents, Your Honor. He can't --

21 THE COURT: That's the entire point of written  
22 discovery. We don't -- otherwise you're doing -- you're  
23 doing written discovery in perpetuity.

24 MR. INGBER: Your Honor, they have an obligation to  
25 supplement -- to 26(e).

1           THE COURT: That is such -- if they become aware of  
2 other information that is responsive, yes, they do.

3           But that does give you the right to keep going back  
4 to them using deposition notices as a surrogate for the  
5 discovery requests you should have served in this case three  
6 years ago. Right?

7           MR. INGBER: We -- we have served discovery  
8 requests. We were told -- we were told that there was a  
9 Marquillas report, Your Honor. For years, we were told. And  
10 then all of a sudden we found out recently, sorry, there is  
11 no Marquillas report. So maybe there -- maybe there'll be  
12 a -- if they don't -- if there is nothing, then there is  
13 nothing. I don't see the burden of making him look in his  
14 files to see if there's anything further. Because we --  
15 maybe it was too broad the last time. Maybe I need to --  
16 based on what I've found out during the Arango deposition,  
17 I've narrowed the scope.

18           THE COURT: I'll leave that to you, but I want to  
19 be clear: One -- because we have gotten very far afield from  
20 the original issue. -- there is no expectation, if you issue  
21 these deposition notices to Moreno and Jiménez, I don't  
22 want -- I don't want to hear another dispute that they  
23 weren't prepared to deal with those subjects, because the  
24 fact is all that is required of Rule 30(b)(1) witness is that  
25 they truthfully answer questions within their knowledge.

1 | There's no independent -- for at least as I understand it --  
2 | and if you're aware of contrary authority, please tell me --  
3 | there's no independent duty, because you're not testifying as  
4 | a designated corporate represent, to go out and prep.

5 |           Now, they may -- or educate themselves about those  
6 | subjects. Right?

7 |           MR. INGBER: They should.

8 |           MR. RAYMOND: No, they shouldn't. That's why I'm  
9 | so confused about --

10 |           (Simultaneous conversation)

11 |           THE COURT: Well, should or shouldn't isn't --  
12 | rather beside the point.

13 |           MR. RAYMOND: Right.

14 |           THE COURT: Do they have an obligation, Plaintiffs'  
15 | Counsel, in your view, under Rule 30(b)(1) to go and educate  
16 | themselves about the subjects?

17 |           MR. RAYMOND: Not the subjects. I would prepare  
18 | them about -- and -- about what they know about and help them  
19 | refresh their recollection and what they know about. I'm not  
20 | going to give them a list of subjects that Mr. Ingber came up  
21 | with. They're not 30(b)(6) witnesses, and they're not  
22 | speaking on behalf of the corporation.

23 |           So I mean, I think he should either give us a new  
24 | 30(b)(6) notice limited to the topics that he has -- has a  
25 | good-faith, you know, presentation for that Mr. Salazar



1 | didn't answer him, and we'll produce a second 30(b)(6)  
2 | notice, and/or he can tell us he wants, you know, one or two  
3 | 30(b)(1), you know, witnesses, and we'll produce those  
4 | witnesses -- it's got to be one or the other, and then that  
5 | should be the end of this. It can't be that Mr. Ingber walks  
6 | back in here and says, well, he didn't -- Medina or Jiménez  
7 | didn't know something I want -- I asked him about. So now I  
8 | need another witness. And I mean, it will go on forever. It  
9 | will go on forever. That's what we're hearing here is he  
10 | wants to start every -- these guys are only there because  
11 | they got mentioned in someone else's deposition. So  
12 | obviously --

13 |           THE COURT: Well, to be fair, Moreno and Jiménez  
14 | are -- again are identified in your own disclosures.

15 |           Mr. Ingber, what -- where are we going?

16 |           MR. INGBER: Your Honor, based on what he's saying,  
17 | it appears -- again, we need to have these two individuals as  
18 | 30(b)(6) witnesses on the topic -- on certain topics.

19 |           THE COURT: Wait.

20 |           MR. RAYMOND: He can't determine what --

21 |           THE COURT: Right. If the -- look. The only way  
22 | that happens, though, Mr. Ingber, right, is if the parties  
23 | stipulate.

24 |           I can't order them to des- -- to produce a  
25 | particular witness as a 30(b)(6). That's simply not how

1 30(b)(6) is written. Right? Or how courts have construed  
2 it.

3 It's very simple. You provide list of topics. The  
4 witnesses -- or the corporation designates the -- a  
5 representative to come in and testify. And the deposition  
6 occurs.

7 So I can't order them to produce Jiménez and Moreno  
8 as 30(b)(6) witnesses. I have no idea, as I sit here,  
9 whether they're competent to testify as to whatever  
10 subjects -- which I also don't know -- that you notice.  
11 Right?

12 MR. INGBER: Your Honor, I think you -- I think  
13 there's material, there's cases in the report, I think you  
14 had already said that they can testify both as a 30(b)(6) and  
15 as a 30(b)(1) at the same time consecutively.

16 THE COURT: If the parties agree. Certainly a  
17 party can. In other words, they could designate or parties  
18 agree, they could designate them as 30(b)(6) witnesses to  
19 testify in addition to testifying as Rule 30(b)(1)s.

20 But I don't have any authority and certainly no  
21 record in front of me, even if I could, to tell them they  
22 have -- that's who they have to designate as a 30(b)(6).

23 MR. INGBER: Well, we're ready to -- because we're  
24 trying to get a resolution here, we're willing to do that,  
25 Your Honor.

1 THE COURT: Okay.

2 MR. INGBER: Because he wants to -- he wants -- the  
3 plaintiffs' counsel wants to do -- do the other thing and  
4 say, hey, if we give you this, then you're done. So we're  
5 trying to figure out a resolution here, Your Honor. These  
6 are complicated issues.

7 THE COURT: Okay. I appreciate that.

8 MR. RAYMOND: And we gave a 30(b)(6) witness.

9 THE COURT: Hold on. Let me do -- be clear. Let  
10 me be clear.

11 So what you're offering as a compromise is if the  
12 plaintiffs will put forth Moreno and Jiménez as -- or,  
13 frankly, Moreno and/or Jiménez, you could have a situation,  
14 at least conceivably -- and I don't know the subjects -- to  
15 be true or necessarily the case, but where one or the other  
16 is the entire 30(b)(6) witness, but if, as between those, if  
17 your 30(b)(6) topics are addressed and they each testify in  
18 their Rule 30(b)(1) capacity, you agree, barring some  
19 completely unforeseeable issue or the 30(b)(6) is not a  
20 competent 30(b)(6) witness, to not seek any additional fact  
21 depositions. Is that right?

22 MR. INGBER: I'm hoping, Your Honor.

23 THE COURT: I need a more definitive answer,  
24 Mr. Ingber.

25 MR. INGBER: Your Honor, okay --

1                   THE COURT: Because I've already left open --  
2 right? -- I've left open either, one, incompetent  
3 Rule 30(b)(6) witness or completely unforeseeable  
4 development.

5                   I don't know what --

6                   MR. INGBER: I think -- I think that's a fair  
7 compromise, Your Honor.

8                   MR. RAYMOND: I cannot agree to produce them as  
9 30(b)(6) witnesses, Your Honor. They have very limited  
10 knowledge about certain things. Mr. Ingber, notwithstanding  
11 being asked again and again and again, refuses to even give a  
12 list of the issues that he claims that Mr. Salazar didn't  
13 testify about. So I can't say that these guys have knowledge  
14 about those issues, because I don't know what they are.

15                   We produced a 30(b)(6) witness for two full days.  
16 They didn't use the two full days, but they could have.

17                   They want 30(b)(1) depositions, then certainly  
18 Your Honor can order those to go forward. But they -- I  
19 can't agree to make them 30(b)(6) witnesses because they have  
20 limited knowledge about certain aspects that would men- --  
21 they just happened to be mentioned in Arango's deposition.  
22 Arango is a third-party defendant on their counterclaim.  
23 So --

24                   MR. INGBER: Your Honor. Mark Ingber.

25                   Well, they can certainly be educated a lot better

1 | than Mr. Salazar was, where --

2 |           THE COURT: I don't know that. I understand you  
3 | feel -- you argue that.

4 |           MR. INGBER: It can't be any worse.

5 |           THE COURT: But I don't know that.

6 |           All right. I'm going to draw what I regard as a  
7 | reasonable compromise in this. I think the -- the -- it  
8 | is -- the Court is satisfied that Moreno and Jiménez qualify  
9 | as relevant witnesses from whom the defendant should be  
10 | afforded opportunity under Rule 26 to take discovery as  
11 | Rule 30(b)(1) witnesses. That is borne out by -- that --  
12 | that conclusion is borne out by -- or from several factor.  
13 | One, as I have said previously today, the plaintiff --  
14 | plaintiff has identified Mr. -- yes, Mr. Jiménez as -- in its  
15 | initial disclosures as having knowledge of the history of  
16 | plaintiffs' Zenu mark, the plaintiffs' product portfolio, the  
17 | plaintiffs' research and development of products sold under  
18 | the Zenu mark, the production of Zenu products, and  
19 | plaintiffs' relationships with suppliers worldwide, which are  
20 | certainly relevant subjects for the Lanham Act and unfair  
21 | competition and other claims in this case.

22 |           Moreover, as to Mr. Jiménez, at least, when  
23 | Mr. Salazar as Rule 30(b)(6) witness was asked about whether  
24 | Marquillas was a supplier of Industria, he said, I do not  
25 | work with the supplier -- this is page 54, Docket

1 Entry 157-2 -- he said he did not work with the suppliers and  
2 that Mr. Jiménez did and did not know -- Mr. Salazar did not  
3 know whether Mr. Jiménez was alerted to Marquillas's  
4 complaint.

5 So the Court is satisfied that as a Rule 30(b)(1)  
6 witness, Santiago Jiménez is relevant.

7 I'm also satisfied that Mr. Moreno is a relevant  
8 witness because of the fact that Mr. Arango testified as a  
9 Rule 30(b)(6) witness for Cordialsa -- Cordialsa SA or --  
10 that essentially there were some communications with  
11 Industria's CEO Diego Medina about Zenu's -- plaintiffs'  
12 Zenu-branded products, and there were meetings in Colombia in  
13 March 2014 concerning efforts between Industria and  
14 Cordialsa, a joint effort to sell plaintiffs' Zenu-branded  
15 products in the U.S., and essentially, though, Mr. Medina  
16 handed that responsibility off to Mr. Moreno.

17 So I find that he too is -- may possess  
18 discoverable information under Rule 26 in his personal  
19 capacity such as to warrant affording the defendant the  
20 opportunity to take a Rule 30(b)(1) deposition of him.

21 I certainly understand the plaintiffs' argument  
22 that the defendants did not identify a deficiency in Arango's  
23 testimony, but I don't think that -- frankly, that the  
24 defendants need to. Mr. Arango was the managing director of  
25 Cordialsa; certainly would not be privy to discussions within

1 Industria concerning the effort to sell plaintiffs'  
2 Zenu-branded products in the United States.

3 So I think that Mr. Moreno is a valid -- or may  
4 possess discover- -- likely enough to possess discoverable  
5 information, that his deposition should go forward.

6 Finally, I think the plaintiffs' argument that the  
7 defendant's showing as to the inadequacy of Mr. Salazar is,  
8 to some degree, a fair one. The defendant certainly was  
9 afforded the opportunity to show the Court all of the  
10 different ways that as a Rule 30(b)(6) witness Mr. Salazar  
11 fell short of the subjects. And, frankly, that showing has  
12 been lacking other than that part of Mr. Salazar's deposition  
13 testimony dealing with Marquillas on page 54 that I  
14 referenced earlier.

15 Nonetheless, the Court regards a Rule 30(b)(6)  
16 witness as sufficiently important in a case of this  
17 complexity that it will permit the defendant one day, one  
18 additional day to complete a Rule 30(b)(6) deposition on the  
19 same subjects that were noticed for the prior deposition. I  
20 do think in the interests of -- and I'm going to require the  
21 defendant not less than a week in advance of that deposition  
22 to send to the plaintiff the specific -- or plaintiffs'  
23 counsel the specific issues that the defendant expects to  
24 cover.

25 I believe that this draws a reasonable compromise

1 between recognizing the potential significance of a  
2 Rule 30(b)(6) witness in a case concerning potential  
3 international sales and Lanham Act claims with the fact that  
4 the defendant has already had approximately eight hours to  
5 depose the Rule 30(b)(6) witness and left open, according to  
6 the plaintiffs, at least, a number of subjects for which was  
7 there no actual inquiry.

8 But in any event this affords the defendant a fair  
9 opportunity to complete Rule 30(b)(6) deposition questioning  
10 without imposing such an undue burden or completely reopening  
11 the Rule 30(b)(6) deposition on an open-ended basis.

12 MR. RAYMOND: Your Honor, could I just ask for one  
13 modification. Could we list of topics two week before the  
14 deposition --

15 THE COURT: Yeah.

16 MR. KADOSH: -- because our client's in Colombia.

17 THE COURT: I think that's fair.

18 MR. RAYMOND: -- and one week gives us no time,  
19 really, to --

20 THE COURT: I think that's more than fair.

21 MR. RAYMOND: -- so -- that assume that list won't  
22 be duplicative of things that Mr. Salazar did testify to.

23 THE COURT: I'm not going to so rule, because that  
24 would require me to make a determination as to what Salazar  
25 competently testified to versus potentially did not. But



1 that's also why I'm limiting it to one day.

2           And I want to be clear: If there's any -- two  
3 things about that. If there's any dispute at the deposition,  
4 you have to call me as soon as the dispute arises. In fact,  
5 I'll leave open, not that you folks would necessarily want to  
6 do this, if you think it would help, you can do the  
7 deposition here. But since defendant is noticing, the  
8 plaintiff is producing, that would have to be a joint  
9 agreement by the parties. I am not going to force it.  
10 Otherwise, the deposition will proceed at Reed Smith. I  
11 assume?

12           MR. RAYMOND: That's where they've --

13           THE COURT: All right.

14           Two --

15           MR. INGBER: Your Honor, I think that is a great  
16 suggestion.

17           Just as to the 30(b)(6) witness --

18           THE COURT: Yeah, that's what I meant.

19           MR. INGBER: -- that we have it here, Your Honor.

20           THE COURT: You folks have it -- I'm not ordering  
21 it. You folks are going to -- if you folks agree, great. If  
22 not, you're still going to have it -- and you can't agree,  
23 you'll still have access to me by phone.

24           But understand, Mr. Ingber, it's one day. That's  
25 what you get.

1 MR. INGBER: One day. But we're --

2 THE COURT: One day.

3 MR. INGBER: But I believe you had just said we're  
4 not limited. It should be recovering topics that were  
5 previously --

6 THE COURT: What you're limited to, at least as far  
7 as my ruling goes, is you're limited in three respects: One,  
8 you have one day. Two, you have to give notice to the  
9 plaintiffs not less than two weeks ahead of time. Three, it  
10 can't be new topics that were outside of the original  
11 30(b)(6) notice. It must either that or quite hopefully some  
12 subset of that.

13 Do you understand?

14 MR. INGBER: Yes.

15 THE COURT: What can't happen is you give them new  
16 topics that were not part of the 30(b)(6) that culminated in  
17 Salazar testifying.

18 MR. INGBER: Right. But I have to go over the  
19 topics, Your Honor, but I presume that we're going to be able  
20 to ask questions to follow up about what happened with Arango  
21 when he went to Colombia and bind the -- a 30(b)(6)  
22 witness --

23 THE COURT: I don't have the 30 topics or  
24 whatever -- how many topics there were in front of me.  
25 You're limited to those topics. I can't give any more

1 guidance --

2 MR. INGBER: Okay.

3 THE COURT: -- than that.

4 MR. INGBER: Thank you, Your Honor.

5 MR. RAYMOND: And, Your Honor it's one of the  
6 things, since -- you know, we designate 30(b)(6) witness.

7 THE COURT: Yeah.

8 MR. RAYMOND: I don't know that there will be a --  
9 any witness who -- who can't respond. I mean, we gave our  
10 30(b)(6) witness, so if he gives a list of topics again, I  
11 can't promise that there is a witness who can testify to all  
12 those topics. I mean, I can raise that with the Court when  
13 we get the list. But I would again ask that the list be  
14 extremely limited to things Mr. Salazar didn't testify about,  
15 because -- trying to find another witness who could testify  
16 about what Salazar already test- -- I mean, he testified at  
17 length about many of these subjects, so to say we --

18 THE COURT: Look, folks, we can do this the hard  
19 way or the easy way. Okay? If you folks can work together  
20 and -- meaning Mr. Ingber can produce a narrowed list of  
21 topics to provide to the plaintiffs and the plaintiffs  
22 produce a witness who is reasonably competent to testify  
23 about those noticed subjects, that's going to be the easy  
24 way. All right?

25 The hard way is we have another dispute and I

1 have -- am faced with the situation of either telling me,  
2 defendant, you got everything you got, too bad, so sad, or  
3 tell the plaintiff, too bad, so sad, you've got to produce  
4 another witness.

5 I don't want to be in that situation. You don't  
6 either.

7 So you folks are going to have to find a way to  
8 work with each other. I'm not going to -- again, I am not  
9 going to presage now what that 30(b)(6) witness, whether it's  
10 Salazar or somebody else, will testify to beyond the topics  
11 noticed in the defendant's original 30(b)(6). But at the  
12 same time, plaintiffs have to produce a witness who's  
13 reasonably prepared. And if that witness is not reasonably  
14 prepared, then you're going to -- probably produce another  
15 witness. I don't know what else I can tell you guys.

16 MR. RAYMOND: Understood, Your Honor. Thank you.

17 MR. INGBER: Thank you, Your Honor.

18 THE COURT: All right. Okay.

19 Last issue. The identities of individuals on the  
20 call with Marquillas SA.

21 Let's cut to the chase on this. What is it that  
22 the defendants are looking for on this and why?

23 MR. INGBER: Your Honor, this Marquillas person,  
24 think we've already established is a key -- witness of  
25 knowledge, Your Honor. Okay?

1 THE COURT: Well, what's the call with Marquillas?

2 MR. INGBER: This call?

3 THE COURT: Yeah, it says -- it says on the call  
4 with Marquillas.

5 Remember, you guys are in the weeds on this. I'm  
6 way out of the loop.

7 So what is this call? And why wouldn't -- frankly,  
8 why wouldn't Jiménez be a position to testify -- I'm sorry.  
9 Is it Jiménez or Moreno?

10 MR. RAYMOND: Your Honor, can I explain what the  
11 issue is here --

12 (Simultaneous conversation)

13 THE COURT: Why wouldn't Jiménez be a position to  
14 testify about this?

15 MR. RAYMOND: I can explain the issue easily.

16 This is a company that was mentioned by Mr. Kadosh  
17 earlier that told us back in 2013 that he was -- they were  
18 asked to produce 400,000 labels for someone else that copied  
19 our trademark. And the person at the company told our person  
20 at our company in confidence about that conversation.

21 Now, the conversation that --

22 THE COURT: Wait. I'm sorry. Make sure I  
23 understand.

24 So who's -- who's having this conversation? This  
25 is a representative of Marquillas.

1 MR. RAYMOND: Somebody else at Marquillas, called  
2 up aliment- -- my client, Industria.

3 THE COURT: Right.

4 MR. RAYMOND: And said we now found out or we were  
5 told that it was -- it was Mr. -- Mr. Zuluaga's mother, who  
6 lives in Colombia, contacted them and said, I want to order  
7 400,000 Zenu labels that look just like that, you know, that  
8 other company's labels.

9 THE COURT: Wait. So if I understand -- I'm just  
10 trying to follow along.

11 So the Marquillas rep called the plaintiff's rep  
12 and said that Wilson Zuluaga's mother placed an order for  
13 400,000 --

14 MR. RAYMOND: We didn't know Wilson Zuluaga at the  
15 time.

16 THE COURT: Right.

17 MR. RAYMOND: Just the woman that we now know is --  
18 who I understand is Zuluaga's mother, made this order. And  
19 they -- since they were our label manufacturer, they thought  
20 that was strange, that some third party was asking --

21 THE COURT: That's who Marquillas is.

22 MR. RAYMOND: What?

23 THE COURT: They're the label-maker.

24 MR. RAYMOND: They're a label-maker.

25 THE COURT: Okay.

1 MR. RAYMOND: That's all they are.

2 So when that conversation took place, the person at  
3 Marquillas who told the person at our client, asked that we  
4 not reveal his -- his or her name.

5 THE COURT: The Marquillas rep asked that.

6 MR. RAYMOND: And that's all it is. That's the  
7 only reason that my clients have -- have -- we disclosed that  
8 the conversation took place. They certainly know --  
9 Mr. Zuluaga knows who his mother spoke to. But they want to  
10 force us to tell them who she spoke to. Our guys -- so my  
11 client feels like they're breaching a confidence in doing.

12 THE COURT: Okay.

13 MR. RAYMOND: If Your Honor orders us to do it, we  
14 will do it.

15 THE COURT: I understand.

16 MR. RAYMOND: But that's -- there's -- Marquillas  
17 has nothing else to do with this case. It just establishes a  
18 date in 2013 when we got some notice that somebody was -- we  
19 didn't know about Wilson Zuluaga. We don't know about  
20 Latinfood at that point. We just learned that somebody  
21 wanted copies of our labels. And that's --

22 THE COURT: In 2013.

23 MR. RAYMOND: And that's pled in our complaint, and  
24 that's literally as deep as this goes. So you can take 15  
25 depositions about it, but that's all -- we're not doing that.

1 MR. KADOSH: -- that we know about it.

2 MR. INGBER: Your Honor?

3 THE COURT: Yes.

4 MR. INGBER: Mark Ingber.

5 Respectfully, it is so much more than that. We  
6 have October 2013th [sic], Your Honor. We have statute of  
7 limitations deadlines relating to that in the case.  
8 Regarding to the --

9 THE COURT: Relating to what? I'm sorry --

10 (Simultaneous conversation)

11 MR. INGBER: -- amended complaint --

12 (Simultaneous conversation)

13 THE COURT: What claim does this give rise to?

14 MR. INGBER: It gives rise to the claims of  
15 copyright infringement that was filed in 2017, Your Honor.

16 THE COURT: Okay.

17 MR. INGBER: We have a three-year statute of  
18 limitation. I'm not going to get into all the vagaries of  
19 that, Your Honor. But this is -- this is essentially a case  
20 of whether or not, as far as we're concerned, whether or not  
21 the plaintiff has -- whether this case is going to continue  
22 beyond summary judgment. Okay?

23 THE COURT: I'm sorry. How does this phone call  
24 and the identity of the individual on the phone call dictates  
25 whether the plaintiffs are within the statute of limitations



1 on the Lanham Act claim or not?

2 MR. INGBER: It's not just to Lanham -- it's not  
3 the Lanham Act.

4 THE COURT: Okay. With whatever claim.

5 MR. INGBER: It's the copyright claim where there's  
6 a three-year statute of that limitations.

7 THE COURT: I'm sorry.

8 MR. INGBER: So we want to find out -- they make  
9 all these allegations we've heard here to -- Your Honor  
10 about. It was the -- my client that called. It was -- it  
11 was my client's mother that called. There's all these  
12 unsubstantiated claim here.

13 We want to know who's making these claims.  
14 Where -- this is a discoverable witness, Your Honor.  
15 There's -- are they representing this Marquillas person? Is  
16 it -- we have -- we have a confidentiality agreement,  
17 Your Honor. They're trying to use this witness as a sword  
18 and a shield. Hey, we make all those allegations. This  
19 person reported this, but somehow, Your Honor --

20 THE COURT: Is this in the complaint?

21 MR. INGBER: Pardon?

22 THE COURT: Is this in the complaint?

23 MR. INGBER: Yes.

24 MR. RAYMOND: Yes, it is.

25 THE COURT: Okay.

1 MR. INGBER: So this is -- this is a very key fact  
2 for us, Your Honor. It's just absurd -- again, all these  
3 other things are -- extraneous. We don't care about that.

4 THE COURT: Okay.

5 MR. INGBER: We want to find out what happened  
6 then, Your Honor. What happened on October 2013? Okay? We  
7 know that the -- that the plaintiffs docket all their calls,  
8 Your Honor, that make reports for everything. So -- and we  
9 can't get the name -- we're being challenged by this  
10 allegation of -- we ordered -- my client ordered 400,000  
11 labels? They get to say this in open court, and we can't --  
12 we can't test the veracity of the witness? And we now know  
13 the Marquillas witness, we want to know the who the  
14 Marquillas witness spoke to at -- at the plaintiff.

15 THE COURT: Want to know who the Marquillas....

16 MR. INGBER: Marquillas contacted plaintiff.  
17 What -- was there a report issued by plaintiff -- who is the  
18 person that was contacted? What do they know about it? What  
19 was said? These are just basic facts.

20 Your Honor, again, that -- as -- in Exhibit F,  
21 Your Honor, we said that do we know that -- we asked -- we  
22 test- -- we -- there was testimony of Mr. Salazar, page --  
23 Your Honor. Do we know the name of the person at Marquillas  
24 that communicated this to Industria?

25 Salazar: "I don't know.

1 "Who would know?

2 "I don't know."

3 I asked: "Can you find out?

4 "I don't know."

5 Mr. Raymond: "We'll provide you with a name, if we  
6 have it. Thank you."

7 But notwithstanding this, we're just back at square  
8 one.

9 THE COURT: Wait. All right. So -- okay. I got  
10 it.

11 I do find, now -- that I had reviewed the amended  
12 complaint filed in 2017, Docket Entry 31, the plaintiffs, as  
13 part of their allegations, do allege that the defendants had  
14 attempted to acquire 400,000 of plaintiffs' labels from, I  
15 guess, it would be Marquillas, Zenu's label provider in  
16 Medellín, who had then alerted the plaintiff to the order and  
17 brought the defendant's scheme, that being, of course, to try  
18 to harness the plaintiffs' marks in goodwill. This is the  
19 allegations in the complaint, of course. For the defendant's  
20 economic benefit.

21 Therefore, I'm more than satisfied that the  
22 discovery that the defendant seeks is relevant under the  
23 broad standard of Rule 26 and will require the plaintiff to  
24 produce it, subject to a confidential designation in the  
25 parties' discovery confidentiality order.

1                   Okay. That's the last issue.

2                   MR. INGBER: Thank Your Honor.

3                   MR. RAYMOND: Thank you.

4                   THE COURT: So -- okay. My next one is 1 o'clock?

5                   THE COURT OFFICER: Mm-hmm.

6                   THE COURT: Okay. Here's what I'm going to let you  
7 guys do.

8                   I would like a -- I would like you to schedule  
9 out -- prepare the order, please, for today. Schedule out  
10 the depositions. And then, say, within -- a meet-and-confer  
11 within two weeks, give me a jointly proposed amended schedule  
12 to complete these remaining discovery items. Propose any  
13 deadlines for experts. I assume each side is anticipating  
14 using experts, given the Lanham Act and copyright claims? Or  
15 am I wrong?

16                  MR. INGBER: Your Honor, Mark Ingber.

17                  We've -- the plaintiff has mentioned that they were  
18 going to be seeking using expert deposition testimony.  
19 They've never designated one individual. We have no idea  
20 about --

21                  THE COURT: Right.

22                  MR. INGBER: -- we don't know how to prepare for  
23 this, even.

24                  THE COURT: I understand. That's why I'm trying to  
25 work through -- I'm at least anticipating -- plaintiff going

1 to use experts?

2 MR. RAYMOND: I don't know yet, Your Honor. We  
3 haven't decided that. But we would just remind Your Honor  
4 that in your order of March 21, you ordered that plaintiff,  
5 us, at the close of fact discovery could make a renewed  
6 application to stay all expert discovery pending District  
7 Court's decision on the spoliation motion and any other  
8 dispositive motion, to which defendant shall respond within  
9 seven days.

10 So we would ask to have that right at the end of  
11 this fact discovery period to renew our application to make  
12 those motions prior to taking on the expense of expert --

13 THE COURT: You can -- you can make the motion,  
14 obviously. Yeah, the point, if I recall correctly, the point  
15 of that was -- I'm almost certain I said let's see what other  
16 discovery there is, because the scope of what other discovery  
17 you were able to get, notwithstanding the corrupted file  
18 servers at Latinfoods may very well have a significant impact  
19 on the -- on the scope of the relief you get, if any.

20 So ultimately in any event, this is going to be a  
21 decision by Judge McNulty, I suspect.

22 Look, let's start here. I would like a schedule  
23 from you folks that includes the close of all -- of getting  
24 all of this getting all of this done, which, as I regard as  
25 the close of fact discovery.

1           A proposal, at least, for experts. And then in the  
2 alternative, the plaintiff can pitch, again, the idea of the  
3 spoliation and staying expert discovery. So at least I have  
4 all options in front of me.

5           All right?

6           MR. RAYMOND: The spoliation at this point and  
7 summary judgment as well. Because we don't think we need  
8 expert testimony --

9           THE COURT: Well, here's the thing, though. I'm  
10 not -- putting the spoliation issue aside. In this  
11 three-plus-year-old case, it's not like, well, we're going to  
12 hold off on whether we're even going to announce if we're  
13 using experts, take a run at summary judgment, and then  
14 decide experts. We're probably not doing that, because this  
15 case is already old enough.

16           So I also want to know if the parties intend to use  
17 experts. Then we'll deal with scheduling.

18           All right?

19           Why don't you folks get that to me by November 6th.

20           MR. INGBER: Your Honor, I believe that you had set  
21 forth in the March 21st hearing that if the defense wants to  
22 renew an application to stay discovery pending the spoliation  
23 motion, a dispositive motion, again, they would send out a  
24 letter that lays out the basis and base -- on even though --  
25 and you were very dubious about it, Your Honor.

1 THE COURT: I was dubious?

2 MR. INGBER: Yes.

3 THE COURT: Dubious means doubtful or sketchy.

4 MR. INGBER: Well, that's what you said,  
5 Your Honor.

6 THE COURT: Oh, you mean not that I was dubious. I  
7 was skeptical of their argument.

8 MR. INGBER: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. INGBER: And you didn't want to stay any  
11 discovery.

12 THE COURT: Look, as much as we've accomplished  
13 today, let's end on a positive note.

14 I'm not taking a position at all on the spoliation  
15 or the stay.

16 MR. INGBER: Thank you.

17 THE COURT: I think the -- I'm pretty sure, first  
18 of all I'm pretty sure the March order issued as a result of  
19 an on-the-record conference call.

20 MR. RAYMOND: Your Honor, I guess in a previous  
21 transcript, you had given us permission to make that motion,  
22 but you then in the subsequent conference said that since it  
23 hadn't been put into an order, it was not binding. And then  
24 you issued this order saying we could renew an application  
25 for that. I believe that's --

1 THE COURT: Nobody is saying that the plaintiffs  
2 cannot make a spoliation motion. It's a question of when and  
3 whether we stay discovery pending that spoliation motion.

4 MR. RAYMOND: Your Honor, we're not asking to stay  
5 any fact discovery. It's only a question whether we would  
6 designate experts and all expert discovery. I don't know  
7 that we're going to have any experts. No one's designated  
8 any yet at this point. But if we did do an expert, one might  
9 be consumer perception survey, which would be an expensive  
10 enterprise for both sides. So the idea was that we could get  
11 summary judgment decided before I even take on that expense,  
12 but we can -- we can hold off until later to make that  
13 application.

14 MR. INGBER: Your Honor, you had indicated that --  
15 during that hearing that the -- that the spoliation motion  
16 would be included in dispositive motion. That was your  
17 thinking. But that you would give -- even though you were  
18 not -- you were dubious about it, Your Honor. You said if  
19 the plaintiff wants to meet that burden, they could do so.

20 THE COURT: Here's what I said. I don't mean to  
21 interrupt, but to move this along, because I already have  
22 counsel in for my next conference, what I said on the  
23 transcript, Docket Entry 142, page 24, talking about the  
24 prior order, I said what the order held was that plaintiff's  
25 application to stay remaining discovery pending adjudication



1 of the sanctions motion is denied plaintiffs could file any  
2 such motion at the close of discovery in conjunction with  
3 dispositive motions.

4           The Court never held -- this is why it struck me as  
5 unlikely when I first heard it -- the Court never held that  
6 expert discovery was going to be stayed. That's not in  
7 either the May 8th order nor the ... Hold on. There's a  
8 whole long -- see what the word is. I essentially said the  
9 Court never took a position on what was going to -- if any  
10 there was going to be stayed pending the spoliation motion.

11           So --

12           MR. RAYMOND: Your Honor, this came just put the  
13 whole thing on the record, in the December 4, 2018.

14           THE COURT: Oh, no, no. We're -- we're not going  
15 to appeal that that --

16           MR. RAYMOND: Okay.

17           THE COURT: -- that's a layer far back. You  
18 referenced my March 26th -- which -- order, which of course  
19 the Court is free, particularly in an evolving discovery  
20 situation, to modify scheduling at any time as it deems  
21 appropriate pursuant to its Rule 16 case management.

22           So long story short, certainly the plaintiff will  
23 be allowed to proceed with a spoliation motion at the  
24 appropriate time. The question is timing. You can pitch me  
25 in the submission that you guys are going to get me by

1 November 6th as to when the spoliation motion in conjunction  
2 with the summary judgment motion is to be made. And -- I  
3 mean, we're all agreed, it won't be before the close of fact  
4 discovery. Right?

5 MR. RAYMOND: No, that's correct, Your Honor.  
6 Just --

7 THE COURT: Right.

8 MR. RAYMOND: -- before -- just talking about  
9 before --

10 THE COURT: So the issue is ripe. Where the  
11 experts and expert discovery fall within that.

12 You folks can pitch me your respective ideas on  
13 that in the submission you get my by November 6th. Okay?

14 MR. RAYMOND: Your Honor, could I ask, can we make  
15 that pitch after fact discovery is over, because I --

16 THE COURT: Sure.

17 MR. RAYMOND: -- things may change by then. We  
18 may --

19 THE COURT: Fair enough.

20 MR. RAYMOND: -- want to make an ...

21 THE COURT: That seems like a very reasonable  
22 suggestion.

23 MR. RAYMOND: Thank you.

24 THE COURT: I want to be clear, lest there's any  
25 confusion, all I'm saying at this point is at the close of

1 fact discovery, you can argue sort of where -- it's sort of  
2 where we go from there. Right? I gather the parties are  
3 going to want to make -- one or both parties are going to  
4 want to make a summary judgment motion. I anticipate that  
5 the plaintiff's going to want to make the spoliation motion.  
6 And then the only issue remaining on the table is what do we  
7 do with expert discovery while that's pending?

8 I have an open mind. Understand, by the way, Judge  
9 McNulty may have His Honor's own opinion about this. All  
10 right?

11 So we'll take it in steps. But I think that makes  
12 a lot of sense.

13 So what I would like is by November 6th, then --  
14 we'll leave it at this. You guys are going to get me a  
15 jointly proposed, I hope, deadline to complete the remaining  
16 fact discovery. Then off of that, we'll set up a telephone  
17 conference at the end of the fact discovery, to talk about  
18 what comes next. All right?

19 MR. RAYMOND: Thank you, Your Honor.

20 MR. INGBER: Thank you, Your Honor.

21 THE COURT: All right. We're adjourned. Thank  
22 you, folks.

23 (Conclusion of proceedings at 12:49 P.M.)  
24  
25

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18 s/ *Sara L. Kern*

28th of October, 2019

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